APPENDIX A

Filed 26 April, 1957.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. 9237

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Plaintiffs,*

v.

THE UNITED STATES OF AMERICA, ET AL., *Defendants.*

(Argued January 21 and 22, 1957. Decided 26 April, 1957.)

Before SOPER, Circuit Judge, CHESNUT and R. DORSEY WATKINS, District Judges.

Edwin H. Burgess (William C. Purnell, Jervis Langdon Jr., Anthony P. Donadio, John S. Stanley, Charles J. Henry Jr., on brief), for plaintiffs.

Harry C. Ames, Washington, D.C. (Thomas N. Biddison, F. Clifford Hane, attorneys for Mayor and City Council of Baltimore, on brief), for Baltimore Association of Commerce and other Baltimore Commercial Interests, plaintiffs.

J. Crossan Cooper Jr. (Francis D. Murnaghan Jr., on brief), for Canton Railroad Company, plaintiff.

William L. Marbury (Donald Macleay, Washington, D.C. and Franklin G. Allen, Baltimore, Md., on brief), for Maryland Port Authority, plaintiff.

John H. D. Wigger, Attorney, Department of Justice (Victor R. Hansen, Assistant Attorney General; Walter E. Black Jr., United States Attorney; James E. Kilday, Attorney, Department of Justice; Robert W. Ginnane, General Counsel and I. K. Hay, Assistant General Counsel, Interstate Commerce Commission, on brief), for defendants.

John F. Donelan, Washington, D.C. (Dickson R. Loos, Washington, D.C., Wendell D. Allen, Baltimore, Md., on brief), for Armco Steel Corporation, M. A. Hanna Company, Iron Ore Company of Canada, National Steel Corporation (Weirton Steel Company Division), Republic Steel Corporation, Wheeling Steel Corporation, and the Youngstown Sheet and Tube Company, intervenors.

Henry E. Foley, Boston, Mass. (Herbert M. Brune, Baltimore, Md. and Clarence I. Peterson, Boston, Mass., on brief), for Port of Boston Commission, intervening defendant.

William Q. Keenan, New Haven, Conn. (Herbert M. Brune, Baltimore, Md. and Robert Bleakney, Boston, Mass., on brief), for the New York, New Haven & Hartford R.R. Co. and for the Boston & Maine R.R. Co., defendants.

Richard M. Murphy, Chicago, Ill. and Samuel H. Moerman, Washington, D.C. (M. C. Smith Jr., Cleveland, Ohio; Robert D. Brooks, New York, N. Y.; Sidney Goldstein, New York, N. Y.; Francis A. Mulhern, Wilbur La Roe Jr., Arthur L. Winn Jr., J. Stanley Payne, Walter J. Myskowski, all of Washington, D.C.; Nicholas G. Penniman III, Baltimore, Md., on brief), for the Erie Railroad Company, defendant; the New York Central Railroad Company and the Port of New York Authority, intervening defendants.

Guernsey Orcutt, Philadelphia, Pa. (Richard R. Bongartz, Philadelphia, Pa.; William Pepper Constable and George W. Constable, Baltimore, Md., on brief), for The Pennsylvania Railroad Company and C. W. Boin, Agent, defendants.

David E. Pinsky, Assistant City Solicitor (David Berger, City Solicitor, on brief), for the City of Philadelphia, intervening defendant.

(George M. Radcliffe, Baltimore, Md. and Frederick H. Knight, Philadelphia, Pa., on brief for Chamber of Commerce of Greater Philadelphia, intervening defendant.)

Warren Price Jr., Washington, D.C. (George M. Radcliffe, Baltimore, Md.; Morris Duane, Philadelphia, Pa.; Bruce A. Wallace, Camden, N.J., on brief), for the Delaware River Port Authority, intervening defendant.

SOPER, Circuit Judge:

This suit was brought by the Baltimore and Ohio Railroad Company, Western Maryland Railway Company, Canton Railroad Company and certain civic authorities and commercial organizations of Baltimore, Maryland, to set aside decisions and orders of the Interstate Commerce Commission which prescribed parity of railroad rates on imported iron ore from the ports of Baltimore, Philadelphia and New York to seventeen destinations in the eastern portion of the so-called differential or Central Freight Association territory. This area lies west of a line from Buffalo, New York to Pittsburgh, Pennsylvania and includes Youngstown, Ohio on the north, Wheeling, West Virginia on the south and other intervening steel

producing points in western Pennsylvania, eastern Ohio and northern West Virginia.[1] The defendants, in addition to the United States and the Interstate Commerce Commission, include as original or intervening defendants the Pennsylvania Railroad Company which serves the port of Baltimore as well as the ports of Philadelphia and New York, the New York Central Railroad Company and the Erie Railroad Company which serve the port of New York, the Port of New York Authority, the New York, New Haven and Hartford Railroad Company and the Boston and Maine Railroad Company which serve the Port of Boston, the Port of Boston Commission and divers producers and fabricators of steel in the differential territory.

The decisions of the Commission which are challenged in this proceeding mark the departure from a long established practice which has kept the rates applicable to both import and export traffic to and from differential territory lower as to Baltimore than the other Atlantic ports. The differentials were first established in 1877 by agreement of the carriers serving the territory in order to avoid misunderstandings in respect to the geographical advantages of Baltimore, Philadelphia and New York, as affected by rail-and-ocean transportation, so as to equalize the aggregate cost of transportation between competing points in the west and the domestic and foreign ports reached through those cities. The differentials were arbitrary in a measure since they reflected only in part the lesser distances to Baltimore and Philadelphia as compared with the distances to New York and Boston, but

[1] Differential territory is defined in *Baltimore Chamber of Commerce v. Ann Arbor R. Co.*, 159 I.C.C. 691, 692. The seventeen points, all consuming or storage centers for iron ore, are Midland, Farrell, Sharon and Sharpsville, Pa.; Martins Ferry, Mingo Jct., Steubenville, Lowellville, Niles, Struthers, Warren, and Youngstown, Ohio; Benwood, E. Steubenville, Follansbee, Weirton and Wheeling, W. Va.

they were established by compromise as the only means of averting rate wars.[2] The differentials applied to all traffic eastbound and westbound, domestic and export-import, between Central territory and the north Atlantic ports. The differential on eastbound export traffic from the differential territory was 60 cents per ton less to Baltimore and 40 cents per ton less to Philadelphia than the corresponding rates to New York. On westbound import traffic the same differential applied to third or fourth class and special commodity rates. Rates to Boston were not to be less than those to New York on domestic or foreign freight. In 1880 an attempt was made to modify the agreement on the ground that changes had substantially equalized ocean freights but after arbitration by the Thurman Advisory Commission the differentials established in 1877 were reaffirmed.

While this arrangement originated in a voluntary agreement of the carriers it has been considered by the Commission from time to time during the past 60 years when it was brought to the Commission's attention by commercial interests in Boston, New York, Philadelphia and Baltimore, and in each instance has been found lawful.[3]

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[2] See *Maritime Asso., Boston Chamber of Commerce* v. *A.A. R.R. Co.*, 95 I.C.C. 539, 567; 126 I.C.C. 199.

[3] For a resume of the history of the differential, see *In the Matter of Differential Rates*, 11 I.C.C. 12 (1905); *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co.*, 219 I.C.C. 151 (1936). It was also considered under varying circumstances in *New York Produce Exchange* v. *Baltimore & O. R. Co.*, 7 I.C.C. 612 (1898); *In the Matter of Relative Rates upon Export and Domestic Traffic in Grain and Grain Products*, 8 I.C.C. 214 (1899); *Chamber of Commerce of N.Y.* v. *N.Y.C. & H.R. R.R. Co.*, 214 I.C.C. 155 (1912); *In the Matter of Import Rates*, 24 I.C.C. 78 (1912); *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I.C.C. 691 (1929); *Lighterage Cases*, 203 I.C.C. 481 (1934); *City of Philadelphia* v. *Baltimore & O. R. Co.*, 231 I.C.C. 21 (1938); *State of New Jersey* v. *Baltimore & O. R. Co.*, 24 I.C.C. 581 (1941); *Port of New York Authority* v. *Baltimore & O. R. Co.*, 248 I.C.C. 165 (1941); *Ex-Parte Grain from Buffalo to N.Y.*, 278 I.C.C. 31 (1950).

Prior to 1930 the differential was applicable to both domestic and import-export traffic. In that year the Commission removed all domestic class rates from the scope of the differential rate structure and prescribed new scales of class rates from the several ports, based primarily on distance.[4] Under this new arrangement the longer distances from the three other ports resulted in a differential on domestic traffic to and from Baltimore, which exceeded the long established differential in its favor on import and export traffic. The domestic first-class rates to Youngstown from Baltimore were fixed at $2.01 per hundred pounds, from Philadelphia $2.16 per hundred pounds, from New York $2.31 per hundred pounds, and from Boston $2.70 per hundred pounds. Since these rates did not cover import and export traffic the railroads in 1932 published new import and export class rates. These were made the same as the new domestic rates so far as Baltimore was concerned and the standard differentials in favor of Baltimore of 20 cents a ton with respect to Philadelphia and 60 cents a ton with respect to New York and Boston were preserved. The import-export class rates from the three cities last mentioned thus became generally lower than their domestic rates.

For some reason, that is not explained, the rates on iron ore from Philadelphia to Pittsburgh have been the same as those from Baltimore to Pittsburgh since 1903. This parity, however, prior to the present controversy, has been only a paper equalization since there has been practically no movement from Philadelphia to Pittsburgh and no attempt has been made by the Baltimore railroads to set up a differential on this traffic.[5]

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[4] *Eastern Case Rates Investigation*, 164 I.C.C. 314.

[5] In the seven years from 1946 to 1952 inclusive, 2,160,000 gross tons moved from Baltimore to the steel mills in Pittsburgh, and 652,500 tons from Baltimore to Johnstown. No tonnage moved

In 1949, in response to complaints from steel producers in the interior calling attention to the increased volume of movement and other changed conditions, the carriers undertook a study of the rate structure and as a result the Baltimore and Ohio, the Western Maryland, the Pennsylvania and connecting lines established, as of October 9, 1950, reduced rates on iron ore from Baltimore to Pittsburgh and also to steel mills in differential territory to the west. The Pennsylvania made a like reduction on iron ore from Philadelphia to Johnstown and Pittsburgh. The new rates retained the regular port differential to destinations in differential territory and parity between Baltimore and Philadelphia on traffic moving to Johnstown and Pittsburgh. No action was taken at this time to establish revised rates on iron ore moving from ports other than Baltimore to differential territory, but the record of the conference of railroads shows that "it was understood the usual port differentials should be observed from the other north Atlantic ports."

In August 1951, the Pennsylvania, anticipating an increase in the volume of imported iron ore and conscious that it could not expect to share in the transportation of the commodity from Philadelphia to the interior without adequate unloading facilities at this port, announced that it would erect a modern unloading facility at Greenwich in South Philadelphia designed to cost not less than $10,000,000. It proceeded to erect such facility and had spent the greater part of this sum before publishing reduced rates on iron ore, effective February 9, 1953, to which reference will now be made. Unloading facilities were installed in Baltimore by the Canton Railroad in 1917.

It was against this background that the Interstate Commerce Commission, in the decisions now under review,

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from Philadelphia to Pittsburgh and only 8333 tons, comprising one cargo, to Johnstown. During the six years from 1946 to 1953 inclusive, approximately 647,000 tons moved from Baltimore to the steel mills in the Youngstown area and none from Philadelphia.

gave its approval to parity of rates on iron ore moving from New York, Philadelphia and Baltimore to Central territory, but denied parity to Boston. The case grew out of the publication by the Pennsylvania of reduced rates on iron ore, effective February 9, 1953, from Philadelphia to the seventeen points in differential territory, and the simultaneous publication of like rates by the New York Central from the ports of New York and Boston, and by the Erie Railroad from New York to destinations in the Youngstown area on their lines. The effect of these publications was to reduce the rates on iron ore from Philadelphia, New York and Boston to Youngstown to $2.71 per gross ton, the same rate which applied to Baltimore.[6] In order to meet this reduction and to preserve at least in part the historic differential, the Baltimore and Ohio and the Western Maryland then published, to be effective February 16, 1953, a reduced rate of $2.51 per ton on iron ore from Baltimore to those of the seventeen points on their lines, thus restoring a 20-cent differential in favor of Baltimore as compared with the other three ports. No attempt was made by the Baltimore railroads to restore the standard differential of 60 cents over New York and Boston.

The Baltimore and Ohio and the Western Maryland also published a reduction of 20 cents per ton, effective February 16, 1953, to Pittsburgh, Johnstown, Donora and Monessen in order to establish a differential on shipments of ore to Pittsburgh in accordance with the general port differential structure and to preserve a proper rate relationship between Pitsburgh and the other named cities. The Pennsylvania countered with a rate reduction of 20 cents per ton, effective February 16, 1953, from Philadelphia and Baltimore to the four named cities, and a further reduction of 20 cents in its rates from Philadelphia

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[6] The rates are stated without the general increase approved in Ex-Parte No. 175.

and Baltimore to the seventeen points in differential territory, effective March 11, 1953.

The Baltimore and Ohio, the Western Maryland and divers Baltimore interests protested the rate reductions by the other railroads and all of the above-mentioned reductions were suspended by the Commission pending an investigation instituted on February 6, 1953. This was followed by a hearing and oral argument, and an order of Division 2 of the Commission on February 5, 1954, which approved the reduction originally published by the Pennsylvania, effective February 9, 1953, giving Philadelphia a parity with Baltimore, but cancelled the tariffs of the New York Central and the Erie equalizing rates from New York and Boston with Baltimore. Division 2 also found that the February 16, 1953 tariffs of the Baltimore and Ohio and the Western Maryland, and the March 11, 1953 tariffs of the Pennsylvania were not just and reasonable and ordered them to be cancelled. The Pennsylvania then published a supplementary tariff making the equalization of rates effective February 19, 1954, whereupon the Baltimore interests filed suit in this court asking a restraining order pending reconsideration by the entire Commission. The court refused to issue the order on the ground that the administrative process had not been completed, with the result that parity rates from Philadelphia went into effect and have since prevailed. The full Commission, on July 30, 1954, stayed its order cancelling the rates from Baltimore, New York and Boston and reopened the proceeding. Finally, on October 1, 1956, the Commission rendered its decision, finding that the February 9, 1953 rates from Philadelphia and New York were justified but that the February 16, 1950 rates from Baltimore, the March 11, 1950 rates from Philadelphia, and the February 9, 1953 rates from Boston were not justified and ordered them cancelled. In this proceeding we are concerned with the propriety of the Commission's

action as to the rates from Baltimore, Philadelphia and New York.[7]

The modification of rates on iron ore by the railroads which serve the Atlantic ports in competition with Baltimore was brought about by important changes in business conditions involving an increased demand for steel and an increase in the importations of iron ore which theretofore had contributed little to the total volume of commodities transported by the railroads from the coast to the interior. The origins of the ore that has been and will be imported through the Atlantic ports have an important bearing on the controversy. No figures are available for the years 1955, 1956 or 1957 since the record before the Commission was closed on December 21, 1954, and the case is submitted to this court on the Commission's record. An outline of the conditions prevailing prior to and after World War II and until the Commission's record was closed is set out in the following excerpt from the report of Division 2 of the Commission:

"Mines in northern Minnesota, Wisconsin, and upper Michigan have for many years been the sole or principal source of supply for the iron-ore requirements of steel mills in central and trunkline territories, the preponderance of the ore moving by rail to Lake Superior docks, thence by water to lower Lake Erie ports, and by rail beyond. Prior to the end of World War II in 1945, importation of iron ore was comparatively light and the preponderance of the ore imported was consumed in furnaces at or near the eastern seaboard. Some imported ore moved to steel mills in the Johnstown and Pittsburgh, Pa., areas but little, if any, moved to mills west thereof. A few shipments which moved to interior points were consigned to manufacturers of paint or other commodities not produced by the steel mills.

"Since the end of World War II, steel producers have developed sources of supply for iron ore in Venezuela,

[7] By a subsequent decision filed on March 19, 1957, the Commission reaffirmed its decision as to the Boston rate.

Chile, Liberia, Brazil, Sweden, and Cuba, and this basic raw material of the steel industry has been imported in large volume. Mines now being developed in Labrador by the Iron Ore Company of Canada will supply large quantities of iron ore for the furnaces of five steel mills in central territory which own stock in that corporation, and to other consumers. During the 6-year period from 1936 through 1941 from approximately 2,000,000 to 2,500,000 tons of iron ore were imported annually. The import movement declined drastically during World War II, reaching a minimum of 402,096 tons in 1943, most of which originated in Canada. Following the war, importation of iron ore increased from 1,189,300 tons in 1945 to 10,145,415 tons in 1951, the latter figure equivalent to over 4 times the prewar tonnage. In 1952, a strike occurred in the steel industry and approximately 9,760,300 tons of iron ore were imported during that year. It is estimated that within a few years 20,000,000 tons of iron ore will be imported annually, a substantial portion of which will move to furnaces in central territory. While ex-lake ore will continue to move from the Lake Erie ports in large volume, it will be replaced by imported ore to a greater extent than in the past."

The full Commission, in its report of October 1, 1956, commented upon the increase in importations of iron ore into the United States in the following excerpt from its decision:

"Iron ore imported into the United States in 1948 originated in 28 foreign countries and aggregated 6,091,677 gross tons. By 1953 the tonnage had increased to 11,074,035 gross tons. The principal exporting countries in this period were Chile, Sweden, Venezuela, Brazil, Liberia, and Peru. On and between August 26 and October 6, 1954, a total of 1,511,875 gross tons of ore were shipped from 13 foreign ports to north Atlantic ports. Of this amount, 776,851 tons (51 percent) entered the Port of Baltimore, 718,809 tons (48 percent) entered the Port of Philadelphia, and 16,215 tons (1 percent) entered the Port of Boston. There was no reported entry of ore at New York during this period. Approximately one-third of this ore originated at Seven Islands, Labrador, from which no tonnage moved prior to 1954."

Statistics furnished to the Commission show that during the years 1952, 1953 and eight months of 1954, 94% of all the ore imported through the north Atlantic ports came from Venezuela, Chile, Sweden, Peru, Brazil and Liberia, amounting to 7,229,903 tons in 1952; 8,065,922 tons in 1953 and 6,746,335 tons in 1954. Bethlehem Steel Corporation and United States Steel Corporation consumed most of the imports. Thus, in the eight months of 1954 the aggregate imports of these two corporations amounted to 77% of the total. Imports to these corporations are not delivered to the railroads but are consigned to their own facilities: at Sparrows Point for the Bethlehem Steel Corporation and Fairless (Morrisville, Pa.) for the United States Steel Corporation. The facilities at Sparrows Point have a capacity of 6,000,000 tons and those at Fairless have a capacity of 2,000,000 tons annually. None of the ore delivered to Sparrows Point moves to differential territory. We are concerned primarily with the importations of iron ore that are delivered to the railroads for transportation to interior points subject to the published rates.

Looking into the future, the most striking factor to be considered is the assured prospect that importations of iron ore from Labrador will dominate the situation. From July 31, 1954, when these shipments began, to December of that year, 1,375,747 tons were unloaded at Baltimore and Philadelphia; and it seems certain that this was merely a beginning for, as the Commission said in its final report, the evidence leaves no doubt that "Labrador tonnage will increase to 10,000,000 tons in 1956 and probably to a greater extent in later years." In short, importations from Labrador may be expected to constitute at least one-half of all the ore imported. The proportion of this business which will come to Baltimore and Philadelphia, respectively, is foreshadowed, although imperfectly, by what happened in the last six months of 1954. In that period 744,017 tons came to Baltimore and

631,730 tons to Philadelphia. The Philadelphia tonnage would have been greater and the Baltimore tonnage less by 113,210 tons but for a strike which caused a diversion to Baltimore to tonnage consigned to Philadelphia.

The effect of the abolition of the differential between Philadelphia and Baltimore, which became effective on February 19, 1954, is shown to some extent by comparison of deliveries of foreign ore from all sources to railroad piers at the two ports in 1953 and 1954. In the first year Baltimore received 1,813,512 tons of which 808,875 were delivered to the railroads for shipment to the differential territory, while Philadelphia received 1,113,917 tons of which 687,994 tons were delivered to the railroads to be delivered, 20,561 tons to Pittsburgh and 667,433 tons to points east of Pittsburgh—none of it going to the differential territory. In 1954, Baltimore received 1,644,294 tons and of this 1,070,457 tons went to destinations west of Pittsburgh; while in this year Philadelphia received 1,564,844 tons of which 681,599 tons went to the differential territory.

The future movement of foreign ore to this country, especially ore from Labrador, is the all-important circumstance in this case. The Labrador deposits are owned by the Iron Ore Company of Canada, of which 27% is owned by the M. A. Hanna Coal and Ore Company and the balance by five steel producers[8] owning plants west of Pittsburgh, including twelve or thirteen plants in differential territory. These corporations are entitled to share in the product in proportion to their interests. The steel producers in differential territory will use their shares and the balance will be sold, for the most part, to the Bethlehem Steel Corporation. All of the ore is shipped from Seven Islands, Quebec. While some of it will move by routes not involved in this proceedings, five or six

[8] National Steel Co., Republic Steel Corp., Armco Steel Corp., Youngstown Sheet and Tube Co., Wheeling Steel Corp.

million tons will move annually through Atlantic ports to inland furnaces. The ore will be carried in ships owned or chartered by the Iron Ore Company of Canada or the participating companies; and the record shows that, in order to save transportation costs by sea, the ore will be delivered, in case of parity of railroad rates, to the nearest port equipped with efficient unloading facilities. The Commission found that the one-way ocean distances from Seven Islands to the four Atlantic Coasts to be: Boston, 950 miles; New York, 1187 miles; Philadelphia, 1320 miles, and Baltimore, 1475 miles. If the Chesapeake and Delaware Canal were used the excess distance to Baltimore over Philadelphia would be 26 miles, but the Commission found that the larger ore vessels cannot use the canal at present and probably would not use it if the canal were deepened. The evidence shows that a 20,000 ton ore carrier with a speed of 14 knots requires three days less steaming time on a round trip basis from Seven Islands to Boston, two days less to New York and twenty-one hours less to Philadelphia than to Baltimore; and that it costs $2,000 per day to operate such a ship. Abolition of the differential of 20 cents per ton in favor of Baltimore and the establishment of parity of railroad rates between Philadelphia and Baltimore would cause shippers to route Labrador ore destined for differential territory through the Port of Philadelphia.

Since the Commission's decision of October 1, 1956 took no account of any shipments subsequent to December 1954, the effect of the parity of rates between Philadelphia and Baltimore in the intervening period was not ascertained, although it might have been done before the decision was rendered. The record, however, throws some light, as we have seen, on the shipments in the limited period between February 19, 1954, when the Pennsylvania put the parity rates into effect, and December 1954. The evidence directed to this period, although necessarily meager, tends to confirm the opinion of experienced wit-

nesses heard by the Commission, that under parity rates Labrador ore destined for differential territory will move through Philadelphia and not through Baltimore. The experience of the Canton Railroad emphasizes this conclusion. This is a shipping road with 37 miles of track in the Port of Baltimore, connecting with the Baltimore and Ohio and the Pennsylvania by rail and the Western Maryland by float. It constructed the first unloading facilities in Baltimore in 1917, in which it has invested $5,000,000 in reliance upon the differential. It is largely dependent upon the importations of ore. In 1952, its tonnage of imported ore comprised 55% of its total of which 39% was iron ore; and in 1953, the corresponding percentages were 66% and 28%, respectively. In the first nine months of 1953, it received 499,000 tons of iron ore but in the same period in 1954 under parity this amount had diminished to 239,000 tons, a decrease of 52%.

A similar situation exists with regard to the much smaller amount of ore which is brought to this country from the Port of Monrovia in Liberia. This ore is controlled by the Republic Steel Corporation, which has furnaces in differential territory and carries the ore in its own ships. In 1952, 420,000 tons were imported and it was estimated that in 1953 the amount would be somewhat larger. Heretofore all or nearly all of this ore was delivered at the Port of Baltimore. The ocean distances (miles) from Liberia to the Atlantic ports are as follows: Boston, 3920; New York, 3973; Philadelphia, 4074, and Baltimore, 4194.

The iron ore brought in from South America and Scandinavia has little bearing on the question at issue. The Commission found that, in the first nine months of 1954, 94% of the ore which originated in Venezuela, Chile, Peru and Sweden was consigned to the United States Steel Corporation and the Bethlehem Steel Corporation. Bethlehem received about 6,000,000 tons, none of which

moves to differential territory. It is estimated that United States Steel will receive about 7,000,000 tons annually, of which 2,000,000 tons will enter the United States through the Gulf ports and 2,000,000 tons more will be consumed at Fairless. There will be a substantial movement from the docks owned by the corporation at Fairless by rail to Pittsburgh. Facilities at Fairless permit the blending of the iron before shipment to Pittsburgh and this service will be improved, and when this is done the United States Steel Corporation will abandon its practice of importing through Baltimore the iron ore for use at Pittsburgh. The corporation is not interested in the rate from Baltimore but desires a lower rate from Fairless to Pittsburgh. Baltimore has an advantage as to distances over the other ports with respect to shipments of ore from South America, except Brazil, but a disadvantage with respect to the shipments from Scandinavia.

Adequate unloading facilities are essential to the delivery of iron ore at a point of entry. Canton Railroad, as we have seen, was the first to establish such a facility in Baltimore in 1917. The Western Maryland followed in 1930, and its facility with subsequent improvements can now handle three ships at a time. The Baltimore and Ohio pier was built in 1950 and 1951 and cost $5,000,000. The capacity of these three piers in Baltimore is 13,500,000 tons per year, based on a 15% use of specially designed ore carrier type ships, and if the use of such ships is raised to 65% the total capacity will be increased to 22,275,000 tons per year. These facilities were constructed while the differential was in effect.

In March 1954, the Pennsylvania completed the first stage of its unloading facility at a cost of $11,000,000. The capacity is from 3,000,000 to 6,000,000 tons of ore, depending on the type of ship. An enlargement, which would have increased the capacity of the facility by 50%, was ordered in 1954 and scheduled to be finished in 1955. The

Pennsylvania contemplates an ultimate expansion which would enable it to treble its original capacity. It estimated that it needed 2,500,000 additional tons of ore per year to maintain its Philadelphia pier profitably. These facilities were established while there was parity of rates between Baltimore and Philadelphia on traffic moving to Pittsburgh.

Bethlehem at Sparrows Point and the United States Steel at Fairless each has its own unloading facility. The first has been in operation since 1946 and the latter since January 1953.

New York and Boston have no modern ore unloading facilities and only a very small tonnage of iron ore passes through these ports. Without parity of rates with Philadephia and Baltimore no facility is planned at either location.

The relation of the rates to the distances for which iron ore is transported from the Atlantic ports to the differential territory is a factor necessary to be considered in this case since § 3 of the statute forbids a carrier to give any undue or unreasonable preference to any port or locality, or to subject any port or locality to any undue or unreasonable prejudice. The short line distances of the railroads from the several ports to Youngstown, Ohio, that is, the shortest physical routes over which traffic may be moved without transfer of lading, although through rates and routes may not be published, are as follows:

To Youngstown, Ohio

From	Short Line Distance miles	Difference in Distance Over Baltimore miles
Baltimore	378	..
Philadelphia	424	46
Morrisville	437	59
New York	490	112
Boston	646	268

The short tariff route distances between these points, that is to say, the shortest routes from each port over which rates on iron ore are actually published, are as follows:

To Youngstown, Ohio

From	Short Tariff Route miles	Excess over the Shortest Tariff Route from Baltimore (W. Md.—381 Miles)
Philadelphia:		
P.R.R.	428	47
Morrisville:		
P.R.R.	441	60
New York:		
Erie	569	188
N.Y.C.	612	231
Boston:		
N.Y.C.	670	289
B&M	661	280
NY., NH., & H.	692	311

For reasons of convenience, the Pennsylvania moves iron ore traffic over longer and more circuitous routes from both Philadelphia and Baltimore to Youngstown. The route which it uses from Philadelphia (434 miles) is practically the same as its short tariff route therefrom (428 miles); but instead of using its short tariff route of 404 miles from Baltimore, it carries the shipments 423 miles through Perryville, Maryland. If its actual operating route from Philadelphia is compared with its actual operating route from Baltimore, the difference in distance is only 11 miles; but if this operating route from Philadelphia is compared with the short operating route from Baltimore—

that of the Western Maryland Railroad—Philadelphia's excess distance is 53 miles.

The decisions of the Commission are set forth in the report of Division 2 on February 5, 1954, 291 I.C.C. 527, and the report of the full Commission on October 1, 1956, 299 I.C.C. 195. The latter dealt principally with additional evidence adduced in the interval and seems to have adopted the report of Division 2 except that it approved the new schedules from New York to the Youngstown area which Division 2 had rejected. The reports recite in considerable detail the history of the differential, hereinbefore set out, and the contentions of the opposing sides[9]; and the findings

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[9] The Commission notes the contentions of the Pennsylvania that parity between Baltimore and Philadelphia is necessary so as not to stifle the importation of iron ore through Philadelphia and so as to enable the steel producers to make proper use of the new facilities at Philadelphia; that the differential was never intended to apply to low-grade bulk material and hence parity did not constitute a departure from the former practice; that Baltimore did not object to parity with Philadelphia on traffic moving to the Pittsburgh area for 50 years and that all imported iron ore moves through Pittsburgh; that the commercial interests of Baltimore will not be injured since parity as far as the Pittsburgh area has not disrupted the general port differential adjustment and the great increase in imports of iron ore will provide ample tonnage for Baltimore's unloading facilities. On the other hand, the Commission takes cognizance of the contentions that interests serving the port of Baltimore are entitled to reap the natural advantages flowing from its location; that parity would deprive Baltimore of these advantages and place the entire port differential rate structure in jeopardy by giving rise to demands for reduced rates on other imported bulk commodities; that the earnings on tonnage carried from Baltimore was substantially greater than tonnage carried from Philadelphia to the differential territory because of the shorter distances from the former port; that parity of rates on iron ore from Baltimore and Philadelphia to Pittsburgh during the past 50 years should be disregarded because there was no movement from Philadelphia to Pittsburgh under this schedule.

of the Commission, which are sometimes mingled with the statement of the contentions of the parties, and the ultimate conclusions of the Commission are then set forth. They may be summarized as follows:

It is shown by a statement filed by the Pennsylvania in support of its claim to parity, which the Commission seems to have found correct, that parity of rates on iron ore applies both from Baltimore and Philadelphia to Steeltown, Pennsylvania, a steel producing point east of Pittsburgh; also from Baltimore and Philadelphia to Buffalo, although the route from Baltimore over the Baltimore and Ohio is 190 miles and that over the Western Maryland is 165 miles longer than the route from Philadelphia over the Pennsylvania. A similar comparison is made between routes from Baltimore and routes from Norfolk to steel mills in Ohio and Michigan as to which parity prevails, although the distances from Norfolk are from 25 to 192 miles longer than the distances from Baltimore. Likewise parity of rates but disparity of distances exist in rates from Lake Erie ports to steel mills in the Youngstown and Wheeling areas, as to which reference is made to the decision of the Commission in *Iron Ore Rate Cases*, 41 I.C.C. 181, in which the Commission pointed out that blast furnaces must be operated continuously and that it is of advantage to the steel producers and also to the operators of the vessels to have more than one port available. It was also shown that there is a movement of large quantities of eastbound ore from Erie and Buffalo to the steel mills at Bethlehem, Fairless, Philadelphia and Sparrows Point under a parity rate of $2.71—notwithstanding the inequality of distances; and it was said that the earnings under the proposed rates from Philadelphia to steel mills in the Youngstown area compare favorably with the earnings under the $2.71 rate from Erie and Buffalo to eastern furnaces.

In both reports the Commission seems to have approved the contention of the Pennsylvania that there are only 11

miles difference between the transportation routes from Philadelphia and Baltimore to the differential territory and, therefore, the services from both ports are substantially identical. In its final report the Commission said:

> "The Pennsylvania urges also that rates from Philadelphia the same as those from Baltimore are justified by mileage and service factors. The average tariff-route distances over the Pennsylvania to the 17 destinations in differential territory are 422 miles from Philadelphia and 398 miles from Baltimore. Based on these distances, the equalized rates yield average ton-mile revenues of 6.4 mills from Philadelphia and 6.7 mills from Baltimore. The actual operating route of the Pennsylvania from Philadelphia is only 11 miles greater than its actual operating route from Baltimore. In both instances, the movement is via Pittsburgh, and approximately 75 percent of either haul is over the same tracks. Thus, the service over the Pennsylvania is substantially identical from both Philadelphia and Baltimore."

This statement seems to say that, in considering difference of distance between Baltimore and Philadelphia, the comparison should be made between the Pennsylvania's direct route from Philadelphia and its unnecessarily long route from Baltimore via Perryville, rather than between the tariff route of the Pennsylvania from Baltimore and the corresponding routes of the Baltimore railroads from Baltimore.

Division 2 of the Commission had little to say about the movement of the Labrador deposits because they had not begun to move prior to February 5, 1954, when the report was filed. The Commission merely quoted an owner of stock in the Iron Ore Company of Canada as saying that five or six million tons of ore will be available for shipment in 1955 and that 10,000,000 tons are likely to be shipped in

1956. It is also pointed out that vessels of eighteen to twenty-eight thousand tons capacity will be used in transporting the ore to the north Atlantic ports; that a large number of railroad cars will be required; that economic necessity will require the movement to take the route from Seven Islands to the mills entailing the lowest transportation costs; and that alternate ports at equal rates are required in order to avoid congestion and to give the steel mills the opportunity to select the port to be used.

In the Commission's report, reference is made to its opinion *In the Matter of Rate Differentials*, 11 I.C.C. 13, which considered the Baltimore differential in 1905. The Commission said that that that time ocean rates favored the northerly ports but now iron ore moves in both chartered vessels and vessels owned by steel companies, and since 1920 ocean rates generally have been equalized with respect to voyage charters to the north Atlantic ports, but in some circumstances there is a saving of cost in routing the ore to the port nearest point of origin and that this might be true on a time charter arrangement or for an integrated shipper. The Commission then pointed out the approximate ocean distances from various points of origin to the Atlantic ports and also set out the figures which showed the amounts of Labrador ore received at Baltimore and at Philadelphia in the period from July 31 to December 5, 1954. The Commission, however, made no specific findings as to the ownership of the vessels in which this ore was carried to the two ports or as to the difference in cost between a voyage to Philadelphia and a voyage to Baltimore. The Commission's figures as to the tonnage received at these two ports is limited to the period from July 31 to December 5, 1954, and no evidence was offered or considered as to the shipments during the year 1955 and 1956 preceding the date of the Commission's decision. The Commission did not pass on the testimony heretofore referred to in his opinion indicating that Labrador ore would seek the port offering the lowest cost of transportation from

the point of origin to the destination in steel producing territory.

The Commission did not undertake to appraise the relative weight of the various factors entering in its decision, but Division 2 stated the following general conclusions with respect to the proposed rates from Philadelphia, New York and Boston:

> "The evidence in support of the proposed adjustment from Philadelphia is substantially stronger than that offered in behalf of the proposed rates from New York and Boston. We are convinced that, in view of the earnings that would be yielded by the suspended rates from Philadelphia, such rates are not below a minimum reasonable level. We are of the view further that establishment of the proposed rates from Philadelphia will not result in disrupting the existing port relationship on traffic generally to destinations in differential territory. As indicated, the rates on iron ore from Baltimore and Philadelphia to the Pittsburgh area have been on a parity for over 50 years without disturbing the port relationship on the other commodities, and no good reason appears why the extension of this parity to ore-consuming points beyond Pittsburgh should change this situation. The record is persuasive that the iron ore tonnage through Baltimore will probably continue to increase regardless of the movement through Philadelphia.
>
> "Moreover, in administering the provisions of the act the Commission is required to carry out the national transportation policy, which has for its ultimate objective the development, coordination, and preservation of a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. The evidence is certain that in the years to come a large proportion of the iron ore used in this country will

originate in foreign countries. This iron ore is and will be an important factor in national defense. Especially in case of national emergency, it is highly desirable that the needs of the steel industry be not jeopardized by forced reliance upon one port which could be incapacitated through congestion or other cause, and that, in the interest of national defense, Philadelphia and Baltimore be placed on a rate parity on imported iron ore as proposed in the schedules filed to become effective on February 19, 1953. Such a parity would not result in undue preference or prejudice."

Division 2 reached the ultimate conclusion that the proposed rates from Philadelphia to the differential territory were just and reasonable but that the rates from New York and Boston were not shown to be just and reasonable

The general conclusions of the full Commission reaffirmed Division 2 with respect to rates from Philadelphia. They found that a substantial increase in iron ore imports would continue in that Labrador tonnage would increase to 10,000,000 tons in 1956 and to a greater extent in later years, and that the tonnage through Baltimore would probably continue to increase notwithstanding the maintenance of a parity rate with Philadelphia and also with New York. The Commission also reaffirmed the conclusions of Division 2 with respect to the necessity for parity in carrying out the national transportation policy. In this respect it said:

"As stated in the prior report, we are required to administer the act so as to carry out the national transportation policy, which has for its ultimate objective the development, coordination, and preservation of a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. Iron ore is a commodity which not only is of importance to the carriers in that it can and should reasonably bear its

full share of the transportation burden, but it is of vital importance to the national defense. Thus, it is highly desirable that the carriers be permitted, within lawful bounds, to establish rates which will permit the movement of this traffic through several ports. These matters, among others of record, have been given consideration in reaching our conclusions herein."

New York and Boston rates:

The railroads serving New York and Boston pointed out the importance of being allowed to share in the new traffic based upon the importation of iron ore so as to replace the large revenues now received from domestic iron ore moving eastward from the Minnesota-Michigan ranges. The railroads also stressed the fact that business interests could not be expected to invest capital in constructing unloading facilities at New York or Boston unless parity of rates was established with Baltimore and Philadelphia, enabling the more northerly ports to share in the business; and they also emphasized the importance of having one or more ports available to handle the new importations.

Division 2 of the Commission, however, pointed out the greater distances from New York and Boston to the differential territory and resulting in the smaller earnings at those ports under parity of rates. It said:

". . . From New York and Boston to the 7 destinations in the Youngstown area, the short-line distances average 487 and 642 miles, respectively, whereas to the same destinations the short-line distances average 424 miles from Philadelphia and 380 miles from Baltimore. The average short line distance from Philadelphia exceeds that from Baltimore by only 11.6 percent whereas the like distances from New York and Boston are greater by 28 and 70 percent, respectively, than the distance from Baltimore.

"The proposed rates from Philadelphia compare favorably with rates applicable on iron ore from and to points in central and trunkline territories and thus come within the 'zone of reasonableness' to which reference is made in *New York Central R. Co.* v. *United States, supra.* The proposed rates from New York and Boston would produce substantially lower revenues from those from Philadelphia. Moreover, the record shows that the facilities at New York and Boston are not adequate for the unloading of iron ore in substantial lots, and there is no positive indication that adequate facilities would be constructed thereat or that any substantial movement through those ports under the proposed rates could be expected. We conclude that, in the circumstances, the proponents of the proposed rates from New York and Boston have not sustained the statutory burden placed upon them to prove that these rates are just and reasonable."

Subsequent to the decision of Division 2 additional testimony was taken in which witnesses for the Boston and Maine and the New York, New Haven and Hartford indicated that unloading facilities would be established at Boston if equal rates with Baltimore were permitted, and similar representations as to the establishment of facilities at New York were made by persons interested in the development of that port. It was however made clear by all of the witnesses that facilities would not be established without assurances of parity of rates.

The Commission then made a comparison of revenues from the four north Atlantic ports to destinations in the Youngstown area. In one computation, using short-line distances, the following tabulation was made of the car-mile and ton-mile revenues on an average load of 62 gross tons and the rate from Baltimore of $3.035, which included the Ex-Parte No. 175 increase, i.e., a general increase applied by the Commission to all the rates:

From	Short-Line Distances miles	Car-Mile cents	Ton-Mile mills
Baltimore	378	49.8	8.0
Philadelphia	424	44.4	7.2
New York	490	38.4	6.2
Boston	646	29.1	4.7

The Commission then considered certain cost studies submitted by the Erie Railroad for the single line haul from New York to Youngstown and for the joint haul with other railroads from Boston, and stated the final conclusion:

> "We have carefully considered all of the evidence pertaining to the estimated out-of-pocket cost from New York and Boston. After restating the costs on the bases indicated, including the distribution of the costs of freight-train repairs, depreciation, and rentals of other than mileage cars over freight-train car-miles, loaded and empty, and the application of the unit cost to the loaded and empty car-miles of the imported ore traffic, we conclude that $2.647 and $3.42 would more nearly approximate the out-of-pocket costs per gross ton from New York and Boston, respectively. On these bases, the rate of $3.035 would exceed the cost from New York by 38.8 cents per gross ton, but would be 38.5 cents less than the costs from Boston."

On this basis the Commission found that the Baltimore rate would be just and reasonable as applied to New York, but would not be just and reasonable as applied to Boston.

The Commission also found that the $2.51 rate from Baltimore to Youngstown proposed by the Baltimore railroads as of February 16, 1953, would not be just and reasonable despite the fact that a comparison of the car-mile and ton-mile revenues via short line distances under the $2.71 rate (without the Ex-Parte No. 175 increase) from

New York to Youngstown, with similar revenues under the $2.51 rate from Baltimore, shows that the latter would exceed the former. The comparison is shown by the following table:

To Youngstown, Ohio

From	Rate	Car-Mile cents	Ton-Mile mills
Baltimore	$2.51	41.2	6.6
New York	2.71	34.3	5.5

In general, the Commission concluded that the natural advantages to which the Port of Baltimore would ordinarily be entitled were outweighed by the need to maintain ports of entry for iron ore at Philadelphia and New York and that this should be accomplished by diverting traffic from Baltimore to the other ports to such an extent that the facilities already established at Philadelphia may be more extensively and profitably used, and so that New York would be encouraged to build facilities which it does not now possess.

The weight to be given to the administrative findings of the Commission and the scope of the authority of the reviewing court are well established. The expert judgment of the Commission in respect to matters in the field committed to it by Congress must be recognized and its conclusions, if supported by substantial evidence on the whole record, must be accepted. The Court is not at liberty to substitute its judgment for that of the Commission. As was said in *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U.S. 541, 547:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission

are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent. v. I.C.C.*, 206 U.S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

The Commission is not required to make detailed findings of fact but must make the basis of its decision clear so that the reviewing court may perform its function. The matter was well stated by Judge Magruder in *New York Cent. R. Co. v. United States*, 99 F.Supp. 394, 400, affirmed, 342 U.S. 890:

> "In Beaumont, S. L. & W. Ry. Co. v. United States, 1930, 282 U.S. 74, 86-87, 51 S.Ct. 1, 75 L.Ed. 221, the Supreme Court, while upholding a Commission order, took occasion to criticize the Commission for the unnecessary burden cast upon the reviewing court by failure of the Commission to include in its report a complete statement showing the grounds upon which its determinations rested. Just how far the Commission is obliged by statute to go in this particular is not so clear as it might be. The Commission does have the duty to set forth in its report the 'basic' or 'essential' or 'quasi-jurisdictional' findings necessary to support its ultimate conclusion, though it must be recognized that such requirement is sometimes obscured in vague questions of degree. United States v. Chicago, M., St. P. & Pac. Railroad Co., 1935, 294 U.S. 499, 55 S.Ct. 462, 79 L.Ed. 1023; United States v. Baltimore & Ohio Railroad Co., 1935, 293 U.S. 454, 463, 55 S.Ct. 268, 79 L.Ed. 587; Florida v. United States, 1931, 282 U.S. 194, 215, 51 S.Ct. 119, 75 L.Ed. 291."

See also *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 504-5; *Eastern-Central Motor Carriers Association v. United States*, 321 U.S. 194, 211-2; and *Secretary of Agriculture v. United States*, 347 U.S. 645, 653, where the failure of the Commission to explain adequately its departure from prior norms led to a remand of the case for more explicit findings.

The specific question which the Commission decided was whether the prospective increase in the importation of iron ore, especially ore from Labrador, requires or justifies the striking down of the long established differential in favor of Baltimore in order to enable Philadelphia and New York to have a share of the traffic and thereby insure their maintenance as ports of entry for the product.

The Commission in reaching its conclusions must of course give effect and adhere to the national transportation policy declared by Congress, which provides for the promotion of sound economic conditions among the several carriers and the establishment of reasonable charges for transportation services without unjust discrimination, undue preferences or advantages and without unfair or destructive competitive practices, to the end that a national transportation system may be built up, adequate to meet the needs of the commerce of the United States and of the Postal Service and of the national defense. See Preamble to 49 U.S.C. §§ 1, 301, 901 and 1101. However, in effecting this policy it is made unlawful for any carrier to give any undue or unreasonable preference to any person, locality or port, or to subject any person, locality or port to undue or unreasonable prejudice or disadvantage. 49 U.S.C. § 3 (1). The statute also provides that when any schedules stating a new rate are filed the Commission is required to have a hearing as to the lawfulness of the rate and the burden of proof is upon the carrier, proposing the rate to show that it is just and reasonable. 49 U.S.C. § 15.

In this case the Commission has concluded that the burden was met and we must determine whether the Commission has made basic findings sufficient to support its conclusions and whether there was substantial evidence to support the findings. In upholding parity of rates for Baltimore, Philadelphia and New York the Commission has disregarded the disparity of distances and thus in effect has approved a lower rate from Philadelphia and New York than the rate from Baltimore. This ruling, moreover, has upset a railroad and Commission practice of many years duration in which the factor of distance was given effect. Such discrimination is not of itself illegal, for there are numerous instances amongst the myriad rates on file in which disparity of distances are necessarily disregarded in the operation of transportation systems. To condemn a rate on this score it must be shown that, in violation of Section 3 of the statute, the rate results in undue or unreasonable preference or inflicts undue or unreasonable prejudice upon certain territory involved. See *New York* v. *United States*, 331 U.S. 284, 305; *United States* v. *Illinois Central*, 263 U.S. 515, 524.

What are the findings upon which the Commission relies as the basis for its conclusion that there should be parity of rates between the ports notwithstanding the factor of distance? As to Philadelphia and Baltimore they seem to be:

1. That there is parity in respect of rates between Baltimore and Philadelphia as to other routes which involve differences in distance;

2. That in any event the difference in distance to the differential territory, measured from Philadelphia and Baltimore, is so insignificant that it should be disregarded, and

3. That the needs of the producers of steel and the requirements of the Postal Service and of the national defense make essential the maintenance of a plurality of ports for the importation of iron ore into the United States.

The propriety and sufficiency of these findings must be appraised against the historic background in which the differential in favor of Baltimore has been maintained. Undoubtedly it originated in the natural advantages derived from the shorter distance of the port to destinations in the west and for this reason has been recognized for many years as a dominant factor in the rate relationships between the competing ports not only by practical railroad men but by impartial governmental authority in control. This practical solution of the difficulties arising from competition was based on solid legal ground, for it is settled that the law does not attempt to equalize opportunities among localities and that the natural advantage which belongs to a locality does not constitute a preference. *United States* v. *Illinois Cent. RR. Co.*, 263 U.S. 515, 524; *New York* v. *United States*, 331 U.S. 284, 331-2; *Alabama G. S. R. Co.* v. *United States*, 340 U.S. 216, 229. The Commission itself is without authority to adjust rates and differentials for the purpose of diverting traffic from one locality to another simply on the ground that too much traffic passes through one gateway and too little through another. *Texas and Pacific R. Co.* v. *United States*, 289 U.S. 627, 639.

This does not mean, of course, that rates are to be rigidly proportioned to respective distances or that a carrier may not reduce its rates to meet competition within the zone of reasonableness, but differences in rates based upon differences in length of haul, density of traffic and other elements of the cost of service are within a long standing practice of rate making, and a rate may not be filed for the purpose of diverting traffic from one locality in order to build up another. *Texas and Pacific R. Co.* v. *United States*, 289 U.S. 627, 636, 639. Even if a reduced rate is reasonable, it is unlawful if it results in undue prejudice. *New York* v. *United States*, 331 U.S. 284, 297, 298. The Commission in reaching its conclusion must consider all of these factors and may not condemn a

difference in rates "unless it is shown not to be justified by the cost of the respective services, by their values, or by other transportation conditions." *United States* v. *Illinois Cent. R.R. Co.*, 263 U.S. 515, 524.

In passing upon the merits of the case, the Commission gave no consideration to the cost or value of the services of the railroads competing for traffic at Philadelphia and Baltimore. No evidence on these points was offered or required; but the ultimate finding of the Commission as to distances from Philadelphia and Baltimore to Central territory was that the difference is so insignificant that the service from both ports is substantially identical. Evidence to support this finding seems to us to be lacking. Not only does the disparity, which had been considered substantial for many years, still exist, but the only standard of measurement proffered by the Commission for its finding was obviously incorrect. The Commission declared that the actual operating route from Philadelphia to Central territory is only 11 miles greater than the operating route from Baltimore. This seems convincing until it appears, from a careful reading of the decision, that the Commission is comparing the distance via the Pennsylvania from Baltimore with the distance via the Pennsylvania from Philadelphia and that in doing so it measures the distance from Philadelphia over a direct route, but measures the distance from Baltimore over a circuitous line through Perryville, which the railroad company adopts for its own convenience. Clearly the treatment was wrong. The comparison should be made on the same basis in each instance, for example, between the short line distances or between the short tariff distances from both ports, which shows a difference of 47 miles in the one case and 24 miles in the other. It is fair to say that the Commission, contrary to its former policy, either gave no weight whatever to the factor of distance or found that it was overborne by the general policy of supplying the needs of national commerce and the requirements of national defense.

We do not overlook the existence of parity of rates despite disparity of distances in respect to other commodities over other routes to which the Commission referred in its decision, seemingly as precedent for its present action. There was nothing new in this situation. These other rates had long existed but in spite of them the differential in favor of Baltimore on traffic moving to the Central territory had been maintained and carriers serving the port in reliance upon it had adjusted their rates and provided and maintained adequate facilities. We think that these other rates furnish no reasonable basis for change of view on the part of the Commission.

It is obvious that the principal basis for the Commission's decision was its finding that parity of rates on imported iron ore moving westerly from the Atlantic Coast to the interior was necessary to insure the maintenance of New York, Philadelphia and Baltimore as ports of entry in furtherance of the policy of Congress to build up a national transportation system. How far the Commission's authority extends in this direction is an interesting and important question. The respondents stress the passage of the Act of September 18, 1940, 54 Stat. 899, whereby the Act to regulate commerce was amended to include the introductory declaration of the national transportation policy. This amendment has been cited in a number of decisions which hold that the Commission must follow it as a guide in the enforcement of all the provisions of the statute.[10] No one suggests, however, that the Commission has general authority to build up the transportation system of the country as it deems best in disregard of the right of a locality to enjoy its natural advantages, or in disregard of Section 3 of the statute

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[10] *Luckenbach S.S. Co.* v. *United States*, 122 F.Supp. 824, affirmed, 347 U.S. 984; *Atlanta & St. Andrew's Bay Ry. Co.* v. *United States*, 104 F.Supp. 193; *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 576; *Pacific Inland Tariff Bureau* v. *United States*, 129 F.Supp. 472.

which prohibits unlawful preferences and unlawful discrimination. At most the national needs constitute one of the factors to be considered while the other factors which have entered into the practice of rate making from the beginning must still be taken into account, the Commission retaining its power to give appropriate weight to each of them.

For our purposes it is enough to determine whether there is substantial evidence to support the finding that a radical change in the rates was needed to support the national policy. In the first place, it is to be noted that there is no evidence of financial weakness on the part of the railroads involved as has led the Commission in some cases to fix rates in aid of the financial necessities of certain carriers. See *New England Divisions* case, 261 U.S. 184. The decision of the Commission is based on the general conclusion that the northerly ports will have no share in the transportation of imported iron ore so long as the differential exists because ocean freights have been generally equalized since 1920 and the ore will inevitably be shipped to the port which enjoys the cheapest railroad rate to the interior.

Definite findings are made as to the ocean distances from major sources of iron ore to the north Atlantic ports, which show the distances from Labrador to be 950 miles to Boston, 1187 miles to New York, 1320 miles to Philadelphia and 1470 miles to Baltimore; and it is said that a round trip between Labrador and Baltimore requires about three more days than a round trip between Labrador and Boston. The Commission, however, does not attempt to review the considerable body of testimony bearing on the relative costs of ocean travel to the several destinations. A witness is quoted as saying that at the present time iron ore from foreign ports moves both in vessels owned by the steel companies and in chartered vessels; that charter agreements may be voyage charters or time charters; that the ocean rates of voyage charters

are equalized to all North American ports; but that in some instances there is a cost saving in routing ore to the nearest port "on a time charter or for an integrated shipped."

These findings are vague and inconclusive for they do not show to what extent differences in distance by sea will influence the movement of the ore. There was direct testimony that water costs bear a direct relationship to the time spent in transit; that the investments in large ore carrying vessels are substantial and operating costs are high, ranging from $1000 to $2000 per day; that the shipipng season from Labrador is short and that time consumed in making round trips is an important element in moving the maximum tonnage to the destination; that vessels under a time charter and vessels owned by the steel companies would be routed to the nearest port, all other factors being equal; and that the ownership of vessels by the steel companies is expanding. The weight of all this testimony tends strongly to support the view that ocean costs will be an influential if not a determining factor in selecting the ports of destinations, which basis is lacking for the general conclusion of the Commission that without parity of rates Philadelphia will have no share in the traffic. On the contrary, shipments during a few months in 1954, the only period considered, indicate that under parity the ore will go to Philadelphia rather than to Baltimore, since Philadelphia enjoys the double advantage of smaller ocean costs and the most modern unloading facilities.

In the absence of specific findings, it does not seem reasonable to destroy a long established differential on the strength of which the railroads serving Baltimore have made large investments and the commercial interests of the port have made their arrangements. Obviously it is no answer to prophesy that the chances are that Baltimore will not suffer a loss of total tonnage under parity because the volume of imports is expected to

greatly increase. The port will still be entitled to the benefits of its geographical position and the expected profits of the new business may not be diverted merely to satisfy the desire of other ports to share therein.

We think, however, that the record furnishes a reasonable basis for the decision of the Commission to retain parity of rates between Baltimore and Philadelphia in respect to traffic to Pittsburgh. Similar reasons for the maintenance of the status quo apply as in the case of Baltimore. It is true that, so far as iron ore is concerned, only a paper rate was involved until recently; nevertheless, parity has existed for more than 50 years with the acquiescence of Baltimore, and it was retained without objection in the revision of rates in 1950 when the rate of imported iron ore from Philadelphia to the Pittsburgh area was reduced by the same amount as the rate from Baltimore. While there has been no significant movement of iron ore from Philadelphia to the steel mills in the Pittsburgh area during this period, there was, as the report of Division 2 of the Commission shows, a substantial movement from Baltimore to this district. The Pennsylvania Railroad announced its intention, in August 1951, to erect a modern unloading facility in South Philadelphia with the obvious purpose to share in this traffic and in its expected increase, but no objection to the existing parity of rates came from the Baltimore railroads until they made their tactical move in 1953 in order to preserve the consistency of their position.[11] In our

[11] The respondent railroads contend that parity as to Pittsburgh is inconsistent with the differential as to the Central territory, pointing out that Youngstown, one of the points in that territory, is 66 miles distant from Pittsburgh over the Pennsylvania Railroad as compared to 76 miles over the Baltimore and Ohio. This incongruity, however, does not present a new element for it has existed throughout the history of the differential and, in any event, we are concerned not with the comparative distances from Pittsburgh but with comparative distances from the ports of Philadelphia and Baltimore.

opinion, it is of great significance that Philadelphia interests have made a large capital investment in providing unloading facilities in the belief that the historic situation would be retained; and it would be unreasonable at this time to deny them the opportunity to make use of the structure which they have set up.

The lack of substantial basis for the allowance of parity to the Port of New York is shown by what has already been said; but it may be added that the approval of parity between New York and the more southerly ports, notwithstanding considerable differences in distances, strengthens the impression that the Commission holds the view that the conventional factors of rate making must yield to considerations of the general welfare. Aside from these considerations the New York decision rests on certain cost data showing that on the Baltimore level a rate from New York would exceed the costs by 38.8 cents per ton. For this reason alone the rate was found to be just and reasonable; and yet in the same opinion the Commission found that the rate of $2.51 from Baltimore, proposed by the Baltimore railroads to take effect February 16, 1953, that is to say, 20 cents under the current rate, would not be just and reasonable, although the evidence shows that the return thereon would exceed the return on the New York rate which the Commission approved. As the four dissenting commissioners point out, the only justification in the record for the proposed rates from New York "is bottomed solely on the desire to meet the competition of Philadelphia and Baltimore."

We conclude (1) that the orders of the Commission should be affirmed insofar as they disapprove the schedules filed to become effective on February 16, 1953, proposing reduced rates from Baltimore to the Pittsburgh and Central areas, and the schedules filed to become effective on February 16, 1953, and March 11, 1953 from Philadelphia to the Pittsburgh and Central areas, respec-

tively; and (2) that the orders be vacated insofar as they approved the schedules filed to become effective on February 9, 1953, proposing reduced rates from New York to destinations in the Central area, and that the continuance of such schedules should be enjoined; and (3) that, insofar as the orders approved the schedules to become effective February 9, 1953, for reduced rates from Philadelphia to Central territory, the case should be remanded to the Commission to make explicit findings as to the relative costs of ocean shipping of imported iron ore to the ports of Baltimore and Philadelphia and as to the traffic therein to be reasonably expected at these ports, if parity is continued or if the differential is restored, taking into consideration the volume of traffic that has passed through these ports since February 19, 1954, when parity went into effect; and (4) that, pending said findings and a decision based thereon, parity between the ports of Philadelphia and Baltimore be retained upon the assumption that steps be taken to secure a prompt determination.

The orders of the Commission are modified and the case is remanded to the Commission for further proceedings consistent with this opinion.

We concur in this opinion:

W. Calvin Chesnut
United States District Judge.

R. Dorsey Watkins
United States District Judge.

APPENDIX B

In the District Court of the United States for the District of Maryland

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CIVIL ACTION No. 9237

THE BALTIMORE AND OHIO RAILROAD COMPANY, CANTON RAILROAD COMPANY, WESTERN MARYLAND RAILWAY COMPANY, BALTIMORE ASSOCIATION OF COMMERCE, THE BALTIMORE CHAMBER OF COMMERCE, THE STEAMSHIP TRADE ASSOCIATION OF BALTIMORE, INC., BALTIMORE CUSTOM HOUSE BROKERS AND FORWARDERS ASSOCIATION, THE MAYOR AND CITY COUNCIL OF BALTIMORE, PLAINTIFFS

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE PENNSYLVANIA RAILROAD COMPANY, AND C. W. BOIN, AGENT, AND THE NEW YORK CENTRAL RAILROAD COMPANY AND ERIE RAILROAD COMPANY, DEFENDANTS

(Filed 22d May 1957)

Decree

This 22d day of May 1957, the Court adopts the findings of fact and conclusions of law appearing in the Opinion filed herein on April 26, 1957, and holds that the Interstate Commerce Commission's Order of October 1, 1956 in its Investigation and Suspension Docket No. 6074, *Iron Ore from Eastern Ports to Central Freight Association Points*, should be (1) in part vacated and the continuance and enforcement of said part enjoined, (2) in part remanded to the said Commission to make more explicit findings, and (3) in part affirmed: to wit, it is:

ORDERED, ADJUDGED, AND DECREED

1. That the order of the Interstate Commerce Commission dated October 1, 1956, is vacated insofar as it approves the tariff schedules on iron ore from New York filed to be effective February 9, 1953, and authorizes the establishment of the rates on iron ore named in said schedules.

2. That the Temporary Restraining Order issued by the Court on October 26, 1956, enjoining the United States and the Interstate Commerce Commission from taking, authorizing, approving, or permitting any action, by any railroad company, particularly the New York Central Railroad Company and the Erie Railroad Company, which would have the effect of establishing or making effective the tariff schedules on iron ore from New York filed to be effective February 9, 1953, is made permanent.

3. That the Interstate Commerce Commission shall make and enter an appropriate order requiring the New York Central Railroad Company and the Erie Railroad Company to cancel their tariff schedules on iron ore from New York published to be effective February 9, 1953.

4. That the order of the Interstate Commerce Commission dated October 1, 1956, insofar as it approves the tariff schedules of the Pennsylvania Railroad Company on iron ore from Philadelphia filed to become effective February 9, 1953, is not supported by essential basic findings, and therefore is remanded to the Interstate Commerce Commission to make more explicit findings as instructed by the Court in the Opinion filed herein.

5. That the rates named in the tariff schedules of the Pennsylvania Railroad from Philadelphia published to become effective on February 9, 1953, be permitted to remain in effect pending said reconsideration and final decision by the Interstate Commerce Commission.

6. That the order of the Interstate Commerce Commission dated October 1, 1956, is affirmed insofar as it disapproves tariff schedules on import iron ore from Baltimore published to be effective February 16, 1953.

7. That the order of the Interstate Commerce Commission dated October 1, 1956, is affirmed insofar as it disapproves tariff schedules on import iron ore from Philadelphia published to be effective February 16, 1953, and March 11, 1953.

(S) Morris A. Soper,
United States Circuit Judge.

(S) W. Calvin Chesnut,
United States District Judge.

(S) R. Dorsey Watkins,
United States District Judge.

APPENDIX C

The National Transportation Policy (Preamble to 49 U.S.C. 1) and the Interstate Commerce Act, 24 Stat. 379, as amended (49 U.S.C. 1 *et seq.*), provide as follows:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * *

Sec. 1. * * * (5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * *

Sec. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or

any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * *

Sec. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the

maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * *

Sec. 15. * * * (7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders wthout answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in the case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require

the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decisions of such questions preference over all other questions pending before it and decide the same as speedily as possible.

* * *

Sec. 15a. * * * (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

FILED
NOV 6 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 465

ERIE RAILROAD COMPANY AND THE PORT OF NEW YORK AUTHORITY, *Appellants*

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees*

No. 466

THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellant*

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees*

On Appeal from the United States District Court for the District of Maryland

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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INDEX

TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT	5
CONCLUSION	15

TABLE OF CASES

Alabama G.S.R. Co. v. United States, 340 U.S. 216	11
Boston and Maine Railroad v. United States, 153 F. Supp. 952	2
Interstate Commerce Commission v. Inland Waterways Corp., 319 U.S. 671	12
Interstate Commerce Commission v. New York Central R. Co., 342 U.S. 890	15
New York Central R. Co. v. United States, 99 F. Supp. 394	15
United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499	12
Virginian Ry. Co. v. United States, 272 U.S. 658	15

TABLE OF STATUTES CITED

49 U.S.C. section 1(5)	11
49 U.S.C. section 3(1)	8, 9, 10, 11, 12, 13, 14
49 U.S.C. section 13	10
49 U.S.C. section 15(1)	2
49 U.S.C. section 15(7)	2, 5, 6, 10
49 U.S.C. section 15a(2)	11
National Transportation Policy (49 U.S.C. preceding section 1)	2, 7, 8

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

STATEMENT

These appeals present novel and important questions arising out of the following proceedings:

In February 1953, the railroads serving the ports of Philadelphia, New York and Boston published reduced rail rates on imported iron ore to certain points in the Youngstown, Ohio, area on the same level as those applying from Baltimore in an attempt to share in a new and expanding movement of iron ore from

foreign sources to the Youngstown area. The reduced rates from Baltimore had been made effective in October, 1950. Almost immediately, the Baltimore rail carriers, which had theretofore enjoyed a monopoly on this new traffic, published 20-cent reductions in their rates, and the Philadelphia carrier did likewise. The Interstate Commerce Commission suspended all of the proposed schedules and entered into an investigation concerning the lawfulness of the proposed rates under the provisions of Section 15(7) of the Interstate Commerce Act.

After lengthy proceedings, the Commission in October 1956 approved the equalizing rates published by the Philadelphia and New York carriers to the Youngstown area. The proposed equalizing rates from Boston were found not to be compensatory and were ordered cancelled.* The subsequently published 20-cent reductions from Baltimore and Philadelphia were also disapproved, the Commission finding that little if any evidence was offered to justify them. The New York rates were approved by the Commission after they were found to be compensatory, competitively necessary, not otherwise unlawful and consistent with the National Transportation Policy—the tests usually employed by the Commission in determining the lawfulness of carrier-proposed rates. Although the Commission was requested by the New York railroads to exercise its powers under section 15(1) to prescribe a parity of rates and by the Baltimore carriers to pre-

* A statutory three-judge District Court for the District of Massachusetts affirmed the Commission's disapproval of the rates proposed from Boston in *Boston and Maine Railroad* v. *United States*, 153 F. Supp. 952, and those rates are not in issue here.

scribe differentially related rates, it refused to prescribe any rates, merely approving those rates which it found had been justified and disapproving those which had not been justified.

In a suit brought by the Baltimore railroads and supporting civic and commercial interests, a statutory three-judge District Court for the District of Maryland affirmed the Commission's orders insofar as they disapproved the subsequent 20-cent reductions from Baltimore and Philadelphia and, since no appeal was taken from that finding, the lawfulness of those rates is no longer in issue. With respect to the equalizing rates from Philadelphia, the District Court ordered the case remanded to the Commission to make explicit findings as to the relative costs of ocean shipping of imported iron ore to Baltimore and Philadelphia and as to the volume of such traffic passing through those two ports.* Pending such findings, the District Court order permits the equalizing Philadelphia rates to remain in effect.

The District Court vacated the Commission's orders insofar as they approved the equalizing rates from New York to the Youngstown area and permanently enjoined the Commission from "taking, authorizing, approving or permitting any action, by any railroad company" which would have the effect of establishing or making such rates effective. Thus, the equalizing rates from New York have never been allowed to become effective and under the District Court order could not be established now or in the future.

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* The equalizing rates from Philadelphia became effective on February 19, 1954, after Division 2 of the Commission unanimously approved the Philadelphia rates but by a 2-to-1 vote disapproved the New York rates.

The opinion of the District Court makes it clear that it did not understand the nature or effect of the Commission's action which it was reviewing. In this proceeding the Commission merely passed upon the lawfulness of carrier-proposed rates and refused to prescribe any rates. The District Court, however, construed the Commission's decision as determining the proper rate relationship between the ports and as prescribing a parity of rates to be observed in the future. In the opening paragraph of its opinion, the District Court states that the suit was brought to set aside decisions and orders of the Commission "which prescribe parity of railroad rates."*

The District Court, obviously failing to appreciate the distinction between voluntary rate action by carriers and prescription of rates by the Commission over carrier objections, held that the Commission did not make the necessary findings to justify its action, which the District Court variously characterized as a "striking down of the long established differential in favor of Baltimore"** or as an adjustment of "rates and differentials for the purpose of diverting traffic from one locality to another." In its opinion the District Court refers to and evidently accepts the Commission's

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* In other parts of its opinion, the District Court correctly states that the Commission merely approved equalizing rates from Philadelphia and New York, but the District Court makes it clear that it considers this to be tantamount to or in effect a prescription of parity rates.

** The District Court erroneously holds that the differential-rate adjustment applying from the four ports of Baltimore, Philadelphia, New York and Boston to the Youngstown area on merchandise traffic also applied on iron ore traffic, although the Boston rate on iron ore has never been related to the others and no iron ore ever has moved through New York to the Youngstown area.

findings which justified and required approval of the carrier-proposed New York rates, but holds these findings insufficient to justify the prescription of rate parity by the Commission, which the District Court erroneously assumes was the Commission's action.

ARGUMENT

1. In their Motion to Affirm,* the Baltimore railroads, who are mainly responsible for the District Court's confusion as to the nature of the Commission's action, for the first time correctly describe the Commission's action with respect to the New York rates as follows (Motion to Affirm, p. 23):

> In this proceeding the only action taken by the Commission was to approve as "just and reasonable" under Section 15(7) a reduced rate from New York which was the same as the rate from Baltimore. The Commission did not prescribe parity as a principle to govern future rate-making, nor did it make any findings which would preclude rates on different levels if justified by a different record.

With this statement, these appellants have no quarrel.** What follows, however, is subject to serious objection. On the next page of their Motion to Affirm, the Baltimore railroads go on to say:

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* The arguments and contentions in all three Motions to Affirm are substantially the same and this brief is in reply to all three, although specific reference is made herein only to that filed by the Baltimore & Ohio Railroad and the Western Maryland Railway.

** With respect to the Philadelphia equalizing rate, the Baltimore railroads still try to argue at page 13 of their Motion to Affirm that "the Commission required (or 'prescribed') parity."

> Accordingly, the effect of the District Court's judgment is to preclude from New York the same rate as from Baltimore on the basis of the present record. In no way, however, would the order of the District Court operate to prevent the New York appellants, if they should want to try again, from seeking to justify on a different record the same rates which, on this record, the District Court enjoined. Nor would the order of the District Court stand in the way of the Commission's reopening the proceeding either on petition or by its own initiative. Thus a continuance of the administrative process is not cut off. On the contrary, its continuance depends on the initiative of the New York appellants in bringing another proceeding under Section 15(7), or action by the Commission in continuing the present proceeding.

Having misled the District Court into believing that the Commission had prescribed a parity of rates and having secured a reversal by the District Court, the Baltimore railroads now urge this Court to affirm the District Court decision by attempting to mislead it as to the nature of the District Court's decree. The District Court's decree (Jurisdictional Statement of these Appellants, Appendix B, page 41a) in the first paragraph vacates the Commission's order insofar as it approves the equalizing rates from New York and in the third paragraph directs the Commission to make and enter an appropriate order requiring the New York railroads to cancel their schedules. If, as the Baltimore railroads contend, the District Court intended to leave the New York carriers free to file new schedules proposing equalizing rates and justify them, these two paragraphs would have sufficed. But the District Court, in the second paragraph of its decree, makes permanent a restraining order which enjoins

the Commission "from taking, authorizing, approving or permitting any action, by any railroad company" which would *have the effect* of establishing or making effective the equalizing rates from New York. Thus, contrary to the contention of the Baltimore railroads, the New York carriers would never be able to make effective equalizing rates from New York if the District Court's order is affirmed.

The argument of the Baltimore railroads only makes it clear that the District Court's decision should be reversed and the Commission's decision should be affirmed. Although the District Court's decree prevents the New York carriers from publishing equalizing rates, there is nothing in the decisions or orders of the Commission or the District Court which prevents the Baltimore carriers from publishing any reduced rates they desire and making effective any reduced rates whose lawfulness they can prove. The 20-cent reductions proposed by the Baltimore carriers were disapproved by the Commission because no serious attempt was made to justify them, and in fact the Baltimore carriers themselves urged their disapproval.* There is nothing to prevent the Baltimore carriers from filing new reduced rates, and if they can prove that such rates would be compensatory, no lower than necessary to meet the competition, not otherwise unlawful, and in accord with the National Transportation Policy, the Commission would of course have to approve such rates. The New York railroads who have successfully met these tests before the Commission in

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* The Baltimore carriers urged the Commission to disapprove all of the proposed schedules and to prescribe differentially higher rates from Philadelphia, New York and Boston than from Baltimore.

justifying their own rates should not be denied the right to participate in the movement of imported iron ore merely because the District Court did not understand the nature of the Commission's action.

If the District Court's decision is reversed and the Commission's decision is affirmed, the necessary facility could be built at New York and the iron ore traffic could start to move through that port. Unless the District Court's decision is reversed, the carriers serving New York are permanently deprived of their right to compete because of the Baltimore carriers' unsupported claims that such competition, if authorized, would be too keen.

2. After finally admitting the nature of the Commission's action and the principles under which the lawfulness of the rates from New York are to be determined, the Baltimore railroads now urge that certain tests were not met* or that the Commission's findings were not sufficiently specific. They argue that the Commission's findings were either inadequate or erroneous on the questions whether the New York rates are (a) lower than necessary to meet the competition, (b) in violation of the provisions of section 3(1), and (c) in accord with the National Transportation Policy. Now that they have been forced to admit the true nature of the Commission's action, the Baltimore carriers cannot successfully make such arguments. Even the District Court in its opinion referred, without apparent criticism, to the Commission's findings which the Baltimore railroads now claim were inadequate or not made at all. In its opinion (Jurisdictional State-

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* Even the Baltimore railroads evidently concede that the New York rates are compensatory and just and reasonable *per se*.

ment of these Appellants, Appendix A, page 34a), the District Court states:

> It is obvious that the principal basis for the Commission's decision was its finding that parity of rates on imported iron ore moving westerly from the Atlantic Coast to the interior was necessary to insure the maintenance of New York, Philadelphia and Baltimore as ports of entry in furtherance of the policy of Congress to build up a national transportation system.

The District Court, however, was of the opinion that such findings did not justify the prescription of parity rates by the Commission (which it erroneously believed the Commission's action to be). It is too late for the Baltimore carriers now to claim that no such findings were made.

3. The argument on which the Baltimore railroads seem to place the heaviest emphasis is that in order to approve the equalizing rates from New York, the Commission had to make a specific finding that such rates would be in compliance with the provisions of section 3(1) of the Interstate Commerce Act and that it failed to do so. The District Court on the other hand, evidently felt that the Commission had made the necessary finding on this point as to the New York rates, but that the Commission erred in finding that section 3(1) would not be violated by a parity of rates which it erroneously believed the Commission had prescribed. The fact that the District Court reversed the Commission's decision and vacated the order as to the New York rates, instead of remanding for additional findings as it did with respect to the Philadelphia rates, seems to confirm this.

In a complaint brought under section 13 of the Interstate Commerce Act alleging that certain rates violate section 3(1), the Commission would of course have to make a specific finding that the rates do or do not violate section 3(1). An investigation under section 15(7) concerning the lawfulness of carrier-proposed rates of the type here involved, however, is a totally different proceeding. Section 15(7) provides that in such a proceeding "the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable." In the ultimate conclusions in its report, the Commission found that the equalizing rates from New York and Philadelphia "are just and reasonable." (299 I.C.C. 210) The carrier's burden to prove a proposed rate is "just and reasonable" does not mean that rates shown to be just and reasonable under section 1 will automatically be approved by the Commission. Where evidence is introduced tending to show that proposed rates would violate any other provisions of the act, the carrier's burden of proving the proposed rates "just and reasonable" includes the burden of rebutting such evidence, and the Commission must find the rates not otherwise unlawful before approving them as just and reasonable. In the same way that the carrier's statutory burden of proving proposed rates "just and reasonable" includes the burden of proving them not otherwise unlawful, so the Commission's formal finding that rates are "just and reasonable" necessarily includes a finding that they are not otherwise unlawful.

Although the Commission must, of course, make the "basic" or "quasi-jurisdictional" findings essential to the statutory validity of its order, the essential findings will vary with the context of the situation presented.

Alabama G.S.R. Co. v. *United States,* 340 U.S. 216. Here there can be no question that the Commission made the essential findings.

The proposed equalizing rates from New York to Youngstown were alleged not only to be in violation of section 3(1), but were attacked before the Commission on several other grounds. In addition to the allegation that the equalizing rates would result in undue preference of New York and undue prejudice to Baltimore, the rates were objected to on such various grounds as (a) being unduly low, (b) constituting a threat to the port-differential adjustment applicable on other import traffic, and (c) jeopardizing the entire iron-ore rate structure in violation of various sections of the act. To the extent that evidence was introduced to support these allegations, such evidence was considered by the Commission and was discussed in the Commission's two reports. After considering all the evidence, the Commission concluded that the rate reductions proposed by the New York and Philadelphia carriers were not unlawful. The Commission stated in its report (299 I.C.C. 208):

> It has long been recognized that carriers may, *within lawful bounds,* so adjust their rates as to secure a fair proportion of the traffic, as well as reasonably to foster the ports which they serve. *That appears to be what the respondents here have attempted to do.* (Emphasis added)

Obviously this meant that the proposed rates did not violate section 3(1), or section 1(5), or section 15a(2), or any other section on which the allegations were based. It was clearly unnecesssary for the Commission to refer to each section by number and make a separate finding that that particular section would not be violated.

There was no showing that equalized rates from New York would cause such a drastic diversion of traffic from Baltimore as to work undue prejudice to that port in violation of section 3(1). In fact, the Commission concluded that traffic at Baltimore will increase, even with equalized rates from New York. The Commission stated (299 I.C.C. 209):

> As stated by the division in the prior report, at page 554, the record is persuasive that the iron-ore tonnage through Baltimore will probably continue to increase even though rate parity is maintained at Philadelphia and this appears to be a reasonable assumption with rate parity also at New York.

Any contention that the Commission did not consider or pass upon the question of undue prejudice to Baltimore is obviously without merit.

It should be borne in mind that a rate schedule initiated by a carrier must be upheld as lawful by the Commission unless adequate reasons are presented for setting it aside. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499. Also, where the Commission finds rates under suspension not shown to be unlawful, the finding does not constitute approval or a prescription of the rates under suspension and they stand only as carrier-made rates. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671. If, after equalized rates are made effective and the necessary unloading facility is built at New York, it appears that Baltimore cannot compete with New York under equal rates, there would be nothing to prevent the Baltimore interests from publishing and making effective such lower rates as they can justify or filing a complaint against the New York rates as being in violation of section 3(1). But there was no evidence

on which the Commission could find that a violation of section 3(1) would result at the present time.

Although these rates apply on iron ore from all sources, from many of which New York is more distant than the competing ports, the Baltimore carriers tried to make it appear that only ore from Labrador was involved and argued that New York, being a shorter distance from Labrador, would have an undue advantage over Baltimore in the form of lower water costs to New York. Then, the Baltimore carriers failed to introduce any evidence by which the Commission could compute the amount, if any, of this claimed water-cost disadvantage. Now they are trying to capitalize on their failure to put in such evidence by contending that the Commission's report is deficient because it made no specific finding as to the amount of this claimed water-cost disadvantage.

Even if there were some substance to the Baltimore claim of a water-cost disadvantage on Labrador ore, the evidence made it clear that the New York carriers would have a chance to compete under equalized rates only for a small fraction of the Labrador ore. The New York equalizing rates would apply to only 7 points, while those of the Baltimore and Philadelphia carriers apply to 17 points. About 90 percent of the Labrador ore production is controlled by steel companies whose plants are located at points not reached by the New York carriers and by a company tied to Philadelphia by virtue of its operation of the ore-unloading facility at that port. The New York carriers would have a real opportunity to compete only with respect to the remaining 10 percent of the Labrador ore.

In the present factual situation, the Commission made all the findings which it was possible for it to

make and all the findings which are essential to the statutory validity of its order.

The Baltimore carriers' contention that the Commission did not make the necessary findings is inconsistent with the District Court's opinion, which seems to hold that the Commission made a finding on the section 3(1) question as to the New York rates, but that the finding was incorrect. The District Court does not say so in so many words, but in various parts of its opinion, makes general statements of principle such as:

> Even if a reduced rate is reasonable, it is unlawful if it results in undue prejudice. (Jurisdictional Statement of these Appellants, Appendix A, page 32a)

Since the District Court did not remand the cause to the Commission with respect to the New York rates, it must be concluded that the Court believed the necessary findings had been made, but that the section 3(1) finding was erroneous.

The District Court's opinion makes clear its conclusion that the prescription of parity rates, which the Court erroneously believed the Commission had specifically or in effect accomplished in this proceeding, would violate section 3(1). The two main reasons for this conclusion seem to be the Court's belief that (1) rates must reflect differences in distance and (2) carriers cannot be forced to depart from voluntarily maintained, long-established differential rate relationships. Whatever may be the weight to be accorded such arguments where the Commission prescribes rates over carrier objections, they obviously do not apply where, as here, the carriers themselves wish to disregard differences in distance for competitive reasons and publish

equalized rates without which they could not compete. See *New York Central R. Co.* v. *United States,* 99 F. Supp. 394, affd. *Interstate Commerce Commission* v. *New York Central R. Co.,* 342 U.S. 890.

It has long been established that the question of whether undue preference or prejudice exists is for the Commission and its finding, supported by substantial evidence, is conclusive unless there was some irregularity in the proceeding or some error in the application of rules of law. It is beyond the province of the Court to consider the weight of the evidence before the Commission or the soundness of the reasoning by which its conclusions were reached. *Virginian Ry. Co.* v. *United States,* 272 U.S. 658. Here, the District Court has violated this long-established principle and substituted its own judgment for that of the Commission.

CONCLUSION

It is therefore respectfully submitted that the Motion to Affirm should be denied and that this Court should note probable jurisdiction.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

APPELLANTS' MOTION AND BRIEF TO RECALL AND CLARIFY THE JUDGMENT.

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INDEX.

PAGE

Appellants' Motion to Recall and Clarify the Judgment 1

Brief in Support of Motion to Recall and Clarify the Judgment 3

Statement 3

Argument 5

I. Issuance Of An Injunction Against The New York Rates Is Contrary To The Plain Meaning Of The Order And Judgment Of This Court..... 5

II. By Necessary Implication The Order Of This Court Has Precluded The District Court From Enjoining Rate Schedules Which Were Ordered Remanded To The Commission For Further Consideration 6

Conclusion 11

Appendix A 12

Appendix B 15

Appendix C 17

Appendix D 21

Table of Cases Cited.

PAGE

Algoma Coal & Coke Co. v. U. S., (E. D. Va., 1935) 11 F. Supp. 487 9

Arizona Grocery Co. v. Atchison, T. & S. F. R. Co., 284 U. S. 370 (1932) 8

Board v. G. N. Ry., 281 U. S. 412 (1930) 8

Cahill v. N. Y. N .H. & H. R. Co., 351 U. S. 183 4

Carlsen v. U. S., (S. D. N. Y. 1952) 107 F. Supp. 398..... 9

Columbus Iron & Steel v. Kanawha & M. Ry. Co., (S. D. W. Va., 1909) 171 F. 713 6

Director General v. Viscose Co., 254 U. S. 498 (1921)..... 9

Great Northern Ry. Co. v. Kalispell Lumber Co., (9 Circ. 1908) 165 F. 25 8

Houston Coal & Coke Co. v. Norfolk & W. Ry., (W. D. Va., 1909) 171 F. 723 7

Kentucky v. Powers, 201 U. S. 1 6

M. C. Kiser Co. v. Central of Georgia Ry. Co. (S. D. G. A. 1916) 236 F. 573 aff'd. 329 F. 718 8

National Bus. Traffic Ass'n. v. U. S., (D. N. J. 1954) 122 F. Supp. 876, 878 7

Palermo v. Luckenbach S. S. Co., 355 U. S. 910 4

Procter & Gamble v. Coe (D. C. Cir. 1738) 96 F. 2d 518, cert. den. 305 U. S. 604 9

Thornton v. Carter, (8 Circ. 1940) 109 F. 2d. 316 6

United States v. Chicago, M., St. P. & P. R. Co., 294 U. S. 499 10

Statutes Cited.

28 U. S. C. §1336 6

Section 15(7) Interstate Commerce Act. 8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957.

ERIE RAILROAD COMPANY AND THE PORT OF NEW YORK AUTHORITY, *Appellants,*

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Et Al., *Appellees,*

No. 465

THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellant,*

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Et Al., *Appellees,*

No. 466

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

APPELLANTS' MOTION TO RECALL AND CLARIFY THE JUDGMENT.

Appellants, Erie Railroad Company, The New York Central Railroad Company and The Port of New York Authority, move to recall this Court's judgment issued to the United States District Court for the District of Maryland on January 9, 1958, for the reason that the District Court has interpreted said judgment and this Court's order of December 9, 1957, to authorize the issuance by the District Court of an injunction against making effective reduced rates on iron ore from New York to the Youngstown area on a level with those applicable from Philadelphia and Baltimore, pending reconsideration and final decision by the Interstate Commerce Commission pursuant to the remand of the District Court, whereas appellants

say that said judgment and order should be interpreted so as to prohibit any such action by the District Court. Appellants respectfully request that said judgment of this Court be recalled and clarified accordingly.

Respectfully submitted,

SAMUEL H. MOERMAN
RICHARD J. MURPHY
Attorneys for Appellants.

BRIEF IN SUPPORT OF MOTION TO RECALL AND CLARIFY THE JUDGMENT.

STATEMENT.

In February, 1953 the rail carriers serving the ports of Philadelphia and New York published reduced rates from those ports on imported iron ore to the Youngstown area, equalizing their rates with those applying from Baltimore to the same area. After suspension and investigation, Division 2 of the Interstate Commerce Commission, in a report dated February 5, 1954, found the rates from Philadelphia lawful but by a 2-to-1 vote disapproved the rates from New York. The Philadelphia carrier published a supplementary schedule making the equalizing rates effective February 19, 1954, whereupon the Baltimore interests filed suit in the Maryland District Court asking a restraining order pending reconsideration by the entire Commission. That court refused to issue the order on the ground that the administrative process had not been completed, with the result that the equalizing rates from Philadelphia went into effect and have since prevailed. On reconsideration the entire Commission not only affirmed the Division's decision as to the lawfulness of the Philadelphia rates but also approved the New York rates. Upon the filing of a suit by the Baltimore interests to set aside the Commission's order, the Maryland District Court issued a temporary restraining order against the New York rates. After hearing, the District Court issued its decree, appended hereto as Appendix A, ordering the Commission's order to be vacated insofar as it approved the New York rates and permanently enjoining such schedules from being made effective. Upon appeal, this Court's order, appended hereto as Appendix B, vacated "so much of the decree of the District Court as did not affirm the order of the Commission" and remanded the cause "for appropriate disposition not inconsistent with" its opinion.

Upon remand, the District Court issued a new "Decree," appended hereto as Appendix C, providing in part as follows:

> 5. That pending reconsideration and final decision by the Commission pursuant to the remand, the tariff schedules on iron ore from New York filed to become effective February 9, 1953 shall not be made effective or permitted to become effective.

Thus, although the District Court correctly declined to enjoin the Philadelphia rates before completion of the administrative process, it now refuses to do the same with respect to the New York rates, even though the Commission had found the New York rates lawful and this Court ordered vacated "so much of the decree of the District Court as did not affirm the order of the Commission." More than 5 years after the New York rail carriers originally published equalizing rates to the Youngstown area they are still unable to make such rates effective and to share in the tremendous volume of import iron ore which their Philadelphia and Baltimore competitors have been monopolizing for the past 4 years. Unless this Court recalls and clarifies its judgment as requested, the New York rail carriers will be effectively blocked from participating in this traffic for several more years, even though there is now little or no doubt that their proposed reduced rates will ultimately be found lawful.

It is submitted that the issuance of a new injunction by the District Court is (1) contrary to the plain meaning of the order and judgment of this Court and (2) outside the jurisdiction of the District Court in the present circumstances.

The relief sought by this motion has been granted in other cases, *Cahill* v. *New York, N.H. & H.R. Co.*, 351 U.S. 183; *Palermo* v. *Luckenbach S.S. Co.*, 355 U.S. 910, decided January 6, 1958.

ARGUMENT.

I.

ISSUANCE OF AN INJUNCTION AGAINST THE NEW YORK RATES IS CONTRARY TO THE PLAIN MEANING OF THE ORDER AND JUDGMENT OF THIS COURT.

In its opinion and order issued in this case, 355 U.S. 175, on December 9, 1957, this Court ordered that:

> "... on the appeals before us, so much of the decree of the District Court as did not affirm the order of the Commission is vacated, and the cause is remanded for appropriate disposition not inconsistent with this opinion."

It is clear then that the above order required the District Court to vacate its decree of May 22, 1957, except insofar as it had affirmed a portion of the Commission's order. The original decree of the District Court had vacated the Commission's order insofar as it had approved the New York rates and expressly enjoined their effectiveness. Since this Court's order provided that "so much of the decree of the District Court as did not affirm the order of the Commission is vacated", the injunction against the New York rates, as one part of the District Court's decree of May 22, 1957 which "did not affirm" the Commission's order, should have been vacated. That part of the decree which enjoined the New York rates clearly did not "affirm" the Commission's order and it is not susceptible to such an interpretation by any mode of construction. Since, as is apparent from the original District Court decree set forth in Appendix A, *infra,* P. 1a, the injunction was an integral part of the "decree of the District Court" and one which "did not affirm the order of the Commission", it "is vacated" and it should be so indicated by this Court.

Thus, since the meaning of this Court's order was clear, it was incumbent upon the District Court "not to alter it or give any further or other relief" not directed by the order such as imposing an injunction against the rates which are now before the Commission on reconsideration. See *Thornton* v. *Carter*, (8th Circ., 1940) 109 F.2d 316.

II.

BY NECESSARY IMPLICATION THE ORDER OF THIS COURT HAS PRECLUDED THE DISTRICT COURT FROM ENJOINING RATE SCHEDULES WHICH WERE ORDERED REMANDED TO THE COMMISSION FOR FURTHER CONSIDERATION.

The construction of this Court's order contended for by appellants is the only construction consistent with the jurisdiction of the Federal District Court. The Federal District Courts of the United States can constitutionally exercise only such jurisdiction as may be granted to them by Congressional enactment. *Kentucky* v. *Powers*, 201 U.S. 1 (1906). Thus there is no inherent power in the federal judiciary to enjoin the publication, filing or effectiveness of rates.

Prior to the passage of the Interstate Commerce Act no jurisdiction existed with respect to that subject because Congress had not exercised its right to so regulate rates. *Columbus Iron & Steel* v. *Kanawha & M. Ry. Co.*, (S.D. W.Va., 1909) 171 F. 713. At the present time the Federal Courts have the power to enjoin rates but they may exercise this statutory power only as anciliary relief where the Court has jurisdiction over an order[1] of the Interstate Commerce Commission which concerns the rates enjoined

[1] 28 U.S.C. § 1336
"Interstate Commerce Commission's Orders. Except as otherwise provided by Act of Congress, the District Courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

and in which the Court finds the Commission order to be invalid. There is, therefore, no jurisdiction in the Federal Courts to enjoin the publication or effectiveness of a rate apart from the jurisdiction to enjoin a Commission order. *Houston Coal & Coke Co.* v. *Norfolk & W. Ry.*, (W.D. Va., 1909) 171 F. 723.

In the course of its opinion, this Court summarized the previous proceedings before the District Court as follows:

> "... an appropriate District Court held that the Commission's approval of parity between New York and Baltimore was without basis in the record and ordered that portion of the Commission's order vacated. The Court further held that the Commission's approval of parity between Philadelphia and Baltimore was not supported by essential findings as to ocean freight costs and remanded that portion of the Commission's order for more explicit findings. *The Court also granted other relief subsidiary to these actions.*" (Emphasis supplied)

Clearly this Court considered the action of the District Court in ordering vacation of that part of Commission's order which approved the rates from New York as the *principal relief* granted and considered the injunction against the tariffs naming rates from New York as only subsidiary or *ancillary relief* necessary to implement the principal relief. But now this case has been remanded to the Commission for a new order. The order of this Court terminated this litigation and withdrew the Commission order, which was the basis for the District Court's jurisdiction, from the further consideration of that Court. Any further judicial action concerning a Commission order with respect to the involved rates would have to be invoked by a new action, which of course can not be brought until the Commission enters a further order in regard to these rates. *National Bus. Traffic Ass'n.* v. *U.S.*, (D. N.J., 1954) 122 F. Supp. 876, 878. Since by this Court's order the proceeding

was returned to the jurisdiction of the Commission, there is no longer any "order" before the District Court to which an injunction of the involved rates can be ancillary. Moreover, the District Court has not by its order reserved any jurisdiction over the subject matter, i.e., the Commission order. It is evident then that such an injunction was an assumption by the District Court of the bare power to suspend rates while they are before the Commission for its administrative determination of their reasonableness.

But such an injunction cannot be issued by a District Court. The power to suspend the effectiveness of rates prior to the final order of the Commission is one which has been entrusted exclusively to the Commission by Section 15(7) of the Interstate Commerce Act which is set forth in Appendix D, *infra*, P. 12a. The controlling rule of law that the Federal Courts have no power to enjoin rates independently of an injunction against an Interstate Commerce Commission order is a corollary of the fundamental principle that the fixing of rates for the future is an administrative function of a legislative nature. *Arizona Grocery Co.* v. *Atchison, Topeka, & Santa Fe Railroad Co.*, 284 U.S. 370 (1932); *Great Northern Ry. Co.* v. *Kalispell Lumber Co.*, (9th Circ., 1908) 165 F. 25. A determination by a Court, acting prior to the Commission's finding of the facts as directed by the remand, that the rates should be enjoined would be the farthest thing from the traditionally limited judicial power to test the legality of final Commission orders.

The law is to the contrary. The power to suspend rates prior to the entry of the final administrative decision is one exclusively entrusted to the Commission. In *Board* v. *Great Northern Ry.*, 281 U.S. 412 (1930), Chief Justice Hughes stated that, "This power of suspension was entrusted to the Commission only." In *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.*, (S.D. G.A., 1916) 236 Fed. 573, aff'd 239

Fed. 718, in concluding that the Commission's power to suspend rates is exclusive, the Court held that this statutory power of the Commission ousts the United States Courts of their general equity jurisdiction of that particular subject. To the same effect are *Director General* v. *Viscose Co.*, 254 U.S. 498 (1921) and *Algoma Coal and Coke Co.* v. *U. S.*, (E.D. Va., 1935) 11 F. Supp. 487. Since the Commission has not as yet completed its consideration of these rates and has yet to enter its final order pertaining to them, the District Court lacked jurisdiction to enjoin these rates. *Carlsen* v. *U.S.*, (S.D. N.Y., 1952) 107 F. Supp. 398.

Again, the well settled rule is that the Federal Courts have not the power to interfere by injunction while a matter committed to the jurisdiction and control of an administrative agency is pending before that agency. *Procter & Gamble* v. *Coe*, (D.C. Cir., 1938) 96 F.2d 518, cert. den. 305 U.S. 604. The considerations which have given rise to the doctrine of "primary jurisdiction" can never be more compelling than they are in this case. For, inasmuch as this Court had ordered that the *reasonableness* of these rates must be reconsidered by the Commission in the light of the interrelationship between the three ports it is an *a fortiori* proposition that the case at this stage presented at least an ambiguous case with respect to the *lawfulness* of the New York rates. It was, therefore, incumbent upon the District Court to stay its hand after this Court had decided that the validity of these rates was still an open question and that the answer to that question must be provided by the Commission in the first instance.

The regulatory scheme as created by Congress is such that the carriers have the right to initiate rates which become effective by their own force unless the Commission in its exclusive discretion chooses to suspend them pending its final determination of their reasonableness. *United States*

v. *Chicago, M., St.P. & P. R. Co.*, 294 U.S. 499. Moreover, Section 15(7) specifically provides that if the proceeding has not been concluded within the suspension period the proposed rate "shall go into effect at the end of such period." Thus if there can be said to have been a degree of ambiguity present in the opinion and order of this Court there can be no doubt that the doctrine of "primary jurisdiction" and the Constitutional inhibitions on the jurisdiction of federal district courts dictate that the order be interpreted as necessarily implying that there be no injunction against any of the rates which were remanded to the Commission for further consideration.

CONCLUSION.

For the foregoing reasons, appellants respectfully pray that their motion be granted.

Dated: Chicago, Illinois
April 30, 1958

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APPENDIX.

APPENDIX A.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

CIVIL ACTION NO. 9237.

The Baltimore and Ohio Railroad Company, Canton Railroad Company, Western Maryland Railway Company, Baltimore Association of Commerce, The Baltimore Chamber of Commerce, The Steamship Trade Association of Baltimore, Inc., Baltimore Custom House Brokers and Forwarders Association, The Mayor and City Council of Baltimore, Plaintiffs.

vs.

United States of America, Interstate Commerce Commission and The Pennsylvania Railroad Company, and C. W. Boin, Agent, and The New York Central Railroad Company and Erie Railroad Company, Defendants.

* * * *

(FILED 22D MAY 1957)

* * * *

DECREE.

This 22d day of May, 1957, the Court adopts the findings of fact and conclusions of law appearing in the Opinion filed herein on April 26, 1957, and holds that the Interstate Commerce Commission's Order of October 1, 1956 in its Investigation and Suspension Docket No. 6074, *Iron Ore from Eastern Ports to Central Freight Association Points*, should be (1) in part vacated and the continuance and enforcement of said part enjoined, (2) in part remanded to the said Commission to make more explicit findings, and (3) in part affirmed: to wit, it is:

ORDERED, ADJUDGED AND DECREED.

1. That the order of the Interstate Commerce Commission dated October 1, 1956, is vacated insofar as it approves the tariff schedules on iron ore from New York filed to be effective February 9, 1953, and authorizes the establishment of the rates on iron ore named in said schedules.

2. That the Temporary Restraining Order issued by the Court on October 26, 1956, enjoining the United States and the Interstate Commerce Commission from taking, authorizing, approving, or permitting any action, by any railroad company, particularly the New York Central Railroad Company and the Erie Railroad Company, which would have the effect of establishing or making effective the tariff schedules on iron ore from New York filed to be effective February 9, 1953, is made permanent.

3. That the Interstate Commerce Commission shall make and enter an appropriate order requiring the New York Central Railroad Company and the Erie Railroad Company to cancel their tariff schedules on iron ore from New York published to be effective February 9, 1953.

4. That the order of the Interstate Commerce Commission dated October 1, 1956, insofar as it approves the tariff schedules of the Pennsylvania Railroad Company on iron ore from Philadelphia filed to become effective February 9, 1953, is not supported by essential basic findings, and therefore is remanded to the Interstate Commerce Commission to make more explicit findings as instructed by the Court in the Opinion filed herein.

5. That the rates named in the tariff schedules of the Pennsylvania Railroad from Philadelphia published to become effective on February 9, 1953, be permitted to remain in effect pending said reconsideration and final decision by the Interstate Commerce Commission.

6. That the order of the Interstate Commerce Commission dated October 1, 1956, is affirmed insofar as it disapproves tariff schedules on import iron ore from Baltimore published to be effective February 16, 1953.

7. That the order of the Interstate Commerce Commission dated October 1, 1956, is affirmed insofar as it disapproves tariff schedules on import iron ore from Philadelphia published to be effective February 16, 1953, and March 11, 1953.

/s/ Morris A. Soper,
United States Circuit Judge.

/s/ W. Calvin Chesnut,
United States District Judge.

/s/ R. Dorsey Watkins,
United States District Judge.

APPENDIX B.

ORDER.

Per Curiam.

This litigation involves the validity of an order of the Interstate Commerce Commission dealing with the proper relationship, under the National Transportation Policy (§1 of the Transportation Act of 1940, 54 Stat. 899, 49 U.S.C., at p. 7107), of railroad tariffs on imported iron ore shipped to a steel-producing area in Pennsylvania, Ohio and West Virginia (the so-called "differential territory" of the Central Freight Association) from the ports of New York, Philadelphia and Baltimore. A tariff differential in favor of Baltimore had existed prior to this controversy. In a succession of tariff reductions, railroads serving New York and Philadelphia filed schedules designed to establish parity of rates among the several ports, while railroads serving Baltimore filed schedules designed to maintain the differential. Upon protest against the New York and Philadelphia schedules by Baltimore civic and commercial interests and railroads serving that port, the Interstate Commerce Commission instituted an investigation as a result of which Division 2 of the Commission filed a report approving the tariff schedules giving Philadelphia parity with Baltimore but finding all other schedules that had been issued in this series of reductions to be not just and reasonable. 291 I.C.C. 527. On petition of various parties, the Commission reopened the proceedings, and on October 1, 1956, the full Commission modified the findings of the Division 2 report to the extent of finding the New York schedules, as well as the Philadelphia schedules, to be just and reasonable, 299 I.C.C. 195. The full Commission's order was challenged in a proceeding instituted under 28 U.S.C. §1336, and an appropriate District Court held that the Commission's approval of parity between New York and Baltimore was

without basis in the record and ordered that portion of the Commission's order vacated. The court further held that the Commission's approval of parity between Philadelphia and Baltimore was not supported by essential findings as to ocean freight costs and anticipated traffic and remanded that portion of the Commission's order for more explicit findings. The court also granted other relief subsidiary to these actions. 151 F. Supp. 258. These are the only portions of the decision below with which we are here concerned. We put to one side those provisions of the decree below in which the District Court affirmed other portions of the Commission's order.

From what appears, it is not precluded that the Commission may find an interrelationship, within the purview of the National Transportation Policy, *supra*, among lawful tariffs to be established between these three ports and the "differential territory." In this light we deem it appropriate that, in reconsidering the relationship between the Philadelphia and Baltimore schedules pursuant to the remand of the District Court, the Commission should be free to reconsider and take action upon the New York schedules. In carrying out the District Court's direction regarding the Philadelphia rates, the Commission should be permitted to take into account the effect of New York rates on the tariff relationship between Philadelphia and Baltimore and the effect of that relationship on New York and to enter such orders with respect to all three ports as the Commission may find to be required by their interrelationship. Accordingly, on the appeals before us, so much of the decree of the District Court as did not affirm the order of the Commission is vacated, and the cause is remanded for appropriate disposition not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE AND MR. JUSTICE BLACK would affirm the judgment of the District Court.

APPENDIX C.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

The Baltimore and Ohio Railroad Company, Canton Railroad Company, Western Maryland Railway Company, Baltimore Association of Commerce, The Baltimore Chamber of Commerce, The Steamship Trade Association of Baltimore, Inc., Baltimore Custom House Brokers and Forwarders Association, The Mayor and City Council of Baltimore,

Plaintiffs,

vs.

United States of America, Interstate Commerce Commission and The Pennsylvania Railroad Company, and C. W. Boin, Agent, and The New York Central Railroad Company and Erie Railroad Company,

Defendants.

Civil Action No. 9237

DECREE.

The decree of this Court entered herein on May 22, 1957 having been appealed to the Supreme Court of the United States, and that Court by its Order entered December 9, 1957, in *Interstate Commerce Commission et al.* v. *Baltimore & Ohio R.R. Co. et al.*, Nos. 463, 464, 465, 466, 467, 468 and 473, October Term, 1957, having held that it is not precluded that the Interstate Commerce Commission may find an interrelationship within the purview of the National Transportation Policy, among lawful tariffs to be established on imported iron ore from the ports of New York, Philadelphia and Baltimore to steel producing areas in

Pennsylvania, Ohio and West Virginia, that in this light it is appropriate that, in reconsidering the relationship between the Philadelphia and Baltimore tariffs pursuant to the remand of this court, the Commission should be free to reconsider and take action upon the New York tariffs, and that in carrying out this court's direction regarding the Philadelphia rates, the Commission should be permitted to take into account the effect of New York rates on the tariff relationship between Philadelphia and Baltimore and the effect of that relationship on New York, and to enter such orders with respect to all three ports as the Commission may find to be required by their interrelationship, and the Court having ordered vacated so much of the decree of this court as did not affirm the order of the Commission of October 1, 1956 in *Iron Ore from Eastern Ports to Central Freight Association Points,* 299 I.C.C. 195, and the Court having remanded the cause to this court for appropriate disposition not inconsistent with its opinion of December 9, 1957, and counsel for the parties in interest having been heard.

Therefore this 18th day of March 1958, the Court adopts the findings of fact and conclusions of law, appearing in the Opinion filed herein on April 26, 1957, except as modified by the Opinion and Order of the Supreme Court; and holds that the Interstate Commerce Commission's Order of October 1, 1956 in its Investigation and Suspension Docket No. 6074, *Iron Ore from Eastern Ports to Central Freight Association Points,* should be (1) in part remanded to the said Commission to make more explicit findings, and (2) in part affirmed:

To Wit it is:

ORDERED, ADJUDGED AND DECREED.

1. That the decree herein of May 22, 1957 be, and it hereby is, vacated.

2. That the order of the Commission dated October 1, 1956 insofar as it approves the tariff schedules of the Pennsylvania Railroad Company on import iron ore from Philadelphia filed to become effective February 9, 1953, is remanded to the Commission to make more explicit findings in accordance with the opinion of this Court filed herein as modified by the order of the Supreme Court.

3. That the rates named in the tariff schedules of the Pennsylvania Railroad from Philadelphia published to become effective on February 9, 1953 be permitted to remain in effect pending said reconsideration and final decision by the Interstate Commerce Commission, and that pending said reconsideration and final decision, rate parity on iron ore between ports of Baltimore and Philadelphia and the destinations here involved be retained.

4. That the order of the Commission dated October 1, 1956, insofar as it approves the tariff schedules on import iron ore from New York filed to become effective February 9, 1956, is remanded to the Commission to reconsider the lawfulness of such tariff schedules.

5. That pending reconsideration and final decision by the Commission pursuant to the remand, the tariff schedules on iron ore from New York filed to become effective February 9, 1953 shall not be made effective or permitted to become effective.

6. That the order of the Interstate Commerce Commission dated October 1, 1956 is affirmed insofar as it disapproves tariff schedules on import ore from Baltimore published to become effective February 16, 1953.

7. That the order of the Interstate Commerce Commission dated October 1, 1956 is affirmed insofar as it disapproves tariff schedules on import iron ore from Philadelphia published to become effective February 16, 1953 and March 11, 1953.

/s/ MORRIS A. SOPER

.....

Morris A. Soper
United States Circuit Judge.

/s/ W. CALVIN CHESNUT

.....

W. Calvin Chesnut
United States District Judge.

/s/ R. DORSEY WATKINS

.....

R. Dorsey Watkins
United States District Judge.

APPENDIX D.

The Interstate Commerce Act, Sec. 15 (7):

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by

whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

28 U.S.C. Sec. 1336.

§ 1336. Interstate Commerce Commission's orders.

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission. June 25, 1948, c. 646, 62 Stat. 931.

MAY 20 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ERIE RAILROAD COMPANY AND THE PORT OF NEW YORK AUTHORITY
vs. *Appellants,*
THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees,*
No. 465

THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellant,*
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees.*
No. 466

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF MARYLAND PORT AUTHORITY, BALTIMORE ASSOCIATION OF COMMERCE AND THE MAYOR AND CITY COUNCIL OF BALTIMORE, APPELLEES, IN OPPOSITION TO APPELLANTS' MOTION TO RECALL AND CLARIFY THE JUDGMENT

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May 20, 1958.

INDEX

Table of Contents

	PAGE
STATEMENT	2
ARGUMENT:	
I. The District Court's Decree Is Reviewable Only On Direct Appeal	5
II. A Motion To Recall Lies Only To Correct Errors or Jurisdictional Defects In The Judgment or Mandate Sought To Be Recalled	8
III. The District Court's Decree Is In Strict Conformity With This Court's Order	10
IV. No Rehearing Is Available At This Time Or At This Stage Of The Proceedings	13
CONCLUSION	14

Table of Citations

Cases

Balto. & Ohio Railroad Company v. United States, 279 U. S. 781	6
Bank of Ky. v. Wistar, 3 Pet. 431	9
Boudoin v. Lykes Brothers Steamship Co., Inc., 350 U. S. 811	9
Browder v. M'Arthur, 7 Wheat. 59	14
Cahill v. New York, N. H. & H. R. Co., 351 U. S. 183	9
Cannon v. United States, 116 U. S. 55	8
Central National Bank v. Stevens, 171 U. S. 108	8
Chicot Co. Drainage Dist. v. Baxter State Bank, 308 U. S. 371	12
City National Bank v. Hunter, 152 U. S. 512	6
Ex Parte Crenshaw, 15 Pet. 119	8

PAGE

Elizabeth v. American Nicholson Pavement Co., 131 U. S. cxlviii App. 13
Ex Parte Fahey, 332 U. S. 258 7
Gardner v. Goodyear Co., 131 U. S. ciii App. 8
Killian v. Ebbinghaus, 111 U. S. 798 9
Matter of Tiffany, 252 U. S. 32 7
Palermo v. Luckenbach Steamship Co., Inc., 355 U. S. 910 9
Peck v. Sanderson, 18 How. 42 14
Re Potts, 166 U. S. 263 6
Re Sanford Fork & Tool Company, 160 U. S. 247 6
Schell v. Dodge, 107 U. S. 629 9
Shawkee Mfg. Co. v. Hartford-Empire Co., 322 U. S. 271 8
Sibbald v. U. S., 12 Pet. 488 ..... 8, 14
Stoll v. Gottlieb, 305 U. S. 165 12
United States v. United States Smelting, R. & M. Co., 339 U. S. 186 6
U. S. v. Gomez, 23 How. 326 9

Statutes

Title 28:
Sec. 1253 6
Sec. 2101(b) 7

Rules of The Supreme Court

Rule 58 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ERIE RAILROAD COMPANY AND THE PORT OF NEW YORK AUTHORITY
vs. *Appellants,*
THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees,*
No. 465

THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellant,*
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees.*
No. 466

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF MARYLAND PORT AUTHORITY, BALTIMORE ASSOCIATION OF COMMERCE AND THE MAYOR AND CITY COUNCIL OF BALTIMORE, APPELLEES, IN OPPOSITION TO APPELLANTS' MOTION TO RECALL AND CLARIFY THE JUDGMENT

The above-named appellees contend that the appellants' motion to recall and clarify this Court's judgment is an attempt to evade well-established limits on the jurisdiction

of this Court. The relief sought by the appellants is of the type obtainable, if at all, only by way of a direct appeal from the District Court's decree or by way of a timely motion for rehearing addressed to this Court. The time for taking either of such measures has already expired. In any event, the motion lacks merit for the reasons stated in the brief filed by the Baltimore and Ohio Railroad in opposition to the motion. We adopt that brief and endorse the argument there made.

STATEMENT

On October 1, 1956, the Interstate Commerce Commission entered an order approving certain railroad tariff schedules and disapproving others, all dealing with the shipment of imported iron ore from the Ports of New York, Philadelphia and Baltimore to seventeen points in so-called Central Territory. The effect of this order was to deprive Baltimore of the standard freight differential *vis-a-vis* New York and Philadelphia which had existed since 1877 and which had been repeatedly examined and approved by the Commission throughout the years. This result was accomplished by approving tariffs filed by the railroads serving New York and Philadelphia which disregarded the established differential while disapproving lower tariffs filed by certain of the railroads serving Baltimore which were designed to reinstate, at least partly, the differential.

Upon entry of the Commission's order, the Baltimore interests filed suit in the appropriate federal court to have it set aside to the extent that it approved the New York and Philadelphia tariffs and disapproved the Baltimore tariff. After extended hearings, the three judge District Court entered a decree on May 22, 1957 affirming the Commission's order insofar as it disapproved the Baltimore

tariff and vacating it to the extent that it approved the New York and Philadelphia tariffs.

For the reasons set forth in its opinion, the District Court: (1) held that essential findings necessary to support the Commission's approval of the Philadelphia tariff had not been made, (2) remanded the case to the Commission to make further findings and to reconsider the lawfulness of the Philadelphia rates in the light of such findings, (3) permitted the Philadelphia tariff to remain in effect pending such reconsideration by the Commission, and (4) enjoined the Commission from approving the New York tariff.

The New York and Philadelphia interests (including the parties making the present motion to recall) perfected an appeal to this Court. On the basis of the jurisdictional statements and motions, this Court entered a *per curiam* opinion and order dated December 9, 1957. It stated that, upon the remand of the case to the Commission, that body ought to be free to consider the interrelationship of the rates from New York with those from Baltimore and Philadelphia "and to enter such orders with respect to all three ports as the Commission may find to be required by their interrelationship."

This Court, therefore, upheld the decision of the District Court that the New York and Philadelphia rates had not been shown to be lawful, but it directed the District Court to remand the New York rate to the Commission along with the Philadelphia rate and to make the terms of the remand broad enough to authorize the Commission to reconsider the relationship between all three ports and in the light of that reconsideration to take action upon the rates from each of the ports. This Court's opinion concludes with the statement that "so much of the decree of the District Court as did not affirm the order of the Commission is vacated, and

the cause is remanded for appropriate disposition not inconsistent with this opinion."*

No motion for rehearing or clarification of the order of this Court was filed by any of the parties to the appeal.

The parties then submitted to the District Court their respective versions of the form of decree that ought to be entered consistently with this Court's opinion and order, and on March 18, 1958, the District Court entered a decree remanding the cause to the Commission as to both the Philadelphia and New York rates. In addition, the District Court directed that pending the Commission's reconsideration the Philadelphia rate, which was already in effect, should remain in effect, but that the New York rate, which had never gone into effect, should not be permitted to become effective.

Thereafter, the appellants filed the present motion to recall and clarify the judgment on May 1, 1958 — nearly five months after the entry of this Court's order and some month and a half after the District Court, acting pursuant to the mandate, entered the outstanding decree of which the appellants complain but from which they failed to appeal. In support of their motion, the appellants urge, apparently in the alternative, (a) that the District Court's decree of March 18th is contrary to the "plain meaning" of this Court's order and judgment and (b) that the decree is, at least, contrary to the "necessary implication" of the order. In addition, a careful reading of the motion will disclose a semi-voiced third contention, namely, that even if the

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* The District Court's decree had affirmed the Commission's disapproval of (1) the rates filed by the Baltimore carriers to re-establish, in part, the differential if the New York and Philadelphia rates should be approved and (2) the rates filed by the Philadelphia carriers to match these lower Baltimore rates. It is this portion of the District Court's decree which was left unmodified.

District Court's action is consistent with this Court's order, that order should be "clarified" so as to prohibit *nunc pro tunc* the District Court's attempt to maintain the *status quo* pending the Commission's further action on remand.

On this state of the record, we submit that the appellants are attempting to use a motion to recall as a means of collaterally attacking the lower court's decree. In support of that view and our contention that the motion should be denied we urge the following propositions:

(a) the appellants' contention that the lower court did not follow the mandate of the judgment of this Court can only be raised by a direct appeal from the decree complained of and no such appeal was taken within the time permitted by law;

(b) a motion to recall lies only to correct errors or jurisdictional faults in the judgment or mandate itself and cannot be used as a substitute for an appeal;

(c) the District Court's decree is in fact in strict conformity with this Court's order;

(d) the appellants cannot request a material change in an order of this Court except by way of a motion for rehearing and no such motion can be made at this time or at this stage of the proceedings.

ARGUMENT

I.

The District Court's Decree is Reviewable Only on Direct Appeal.

It has long been the rule that the actions of lower courts taken or purporting to have been taken pursuant to mandates of this Court are reviewable only by way of a

direct appeal from the order or decree complained of, or, in a proper case, by a writ of mandamus. *Re Potts*, 166 U. S. 263, 41 L. ed. 994; *Re Sanford Fork & Tool Company*, 160 U. S. 247, 40 L. ed. 414; *City National Bank v. Hunter*, 152 U. S. 512, 38 L. ed. 534. And a case, such as the present, where the matter complained of is the action of a three judge District Court pursuant to a remand from this Court in a case involving the I. C. C. is no exception to this rule. *Baltimore & Ohio Railroad Company v. United States*, 279 U. S. 781, 73 L. ed. 954.

This rule is applicable to the present case even though the District Court's decree staying the effectiveness of the New York tariff pending reconsideration by the Commission upon remand is not a final order since this Court has long held such an order to be an interlocutory injunction appealable under 28 U. S. C. 1253. In *United States v. United States Smelting, R. & M. Co.*, 339 U. S. 186, 94 L. ed. 750, the I. C. C. entered an order enjoining several railroads from performing certain switching and spotting services. On petition to a three judge District Court, it was held that the Commission's order was not supported by findings based upon competent evidence. Thereupon, the cause was remanded and the Commission temporarily enjoined from enforcing the original order. After remand, the Commission simply restated the ground for its action and reentered the original order, but took no further evidence. A second petition to the District Court resulted in the I. C. C. order being permanently enjoined. On appeal to this Court, the appellee contended that the appellant's failure to appeal the first decision of the District Court precluded an appeal from the second under the doctrine of the law of the case. In rejecting this contention this Court said (339 U. S. at 198-99):

> "It is not applicable here because when the case was first remanded, nothing was finally decided. The whole proceeding thereafter was in fieri. The Commission had a right on reconsideration to make a new record. Ford Motor Co. v. National Labor Relations Board, 305 U. S. 364, 374, 375, 83 L. ed. 221, 230, 231, 59 S. Ct. 301. When finally decided, all questions were still open and could be presented. The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because a temporary injunction had been granted in order to maintain the status quo. This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable. 28 U. S. C. A. §1253, F. C. A. title 28, §1253. The appellants might have appealed, but they were not bound to. We think that it requires a final judgment to sustain the application of the rule of the law of the case as it does for the kindred rule of res judicata."

In view of this well-established right to an appeal and the fact that the lower court did not *refuse* to act but entered a decree pursuant to the mandate, it would seem perfectly clear that a petition for mandamus would not be granted even if the same had been properly filed. *Ex Parte Fahey*, 332 U. S. 258, 91 L. ed. 2041; *Matter of Tiffany*, 252 U. S. 32, 64 L. ed. 443. The appellants' sole method of seeking a review of the lower court's decree is, therefore, by way of direct appeal.

Why the appellants failed to note an appeal within the thirty days permitted for appeals from interlocutory injunctions (28 U. S. C. 2101 (b)) must remain a matter of conjecture. However, it is perfectly clear that the appellants should not be permitted to take a belated appeal in the guise of a motion "to recall and clarify" this Court's judgment.

II.

A Motion to Recall Lies Only to Correct Errors or Jurisdictional Defects in the Judgment or Mandate Sought to be Recalled.

As we have seen, the appellants contend that the District Court entered a decree which they maintain is contrary to the mandate of this Court's judgment. There is not even the slightest suggestion that there is any error or jurisdictional defect in the order of this Court. And yet the presence of such an error or jurisdictional defect was the sole basis upon which motions to recall were granted in the relatively few cases in which such a procedure has been held proper.

Thus, motions to recall the judgment and mandate of this Court have been granted in cases where—

(a) this Court found that it lacked jurisdiction because of the collusive nature of the suit or otherwise. *Gardner v. Goodyear Co.*, 131 U. S. ciii App., 21 L. ed. 141; *Cannon v. United States*, 116 U. S. 55, 29 L. ed. 561.

(b) the judgment had been obtained by fraud of the successful litigant. *Shawkee Mfg. Co. v. Hartford-Empire Co.*, 322 U. S. 271, 88 L. ed. 1269.

(c) the judgment was entered under the mistaken assumption that the appellee had been notified of the appeal and was in default, whereas he had never been notified. *Ex Parte Crenshaw*, 15 Pet. 119, 10 L. ed. 682.

(d) the mandate is either inconsistent with the opinion or otherwise fails to give effect to the judgment. *Sibbald v. U. S.*, 12 Pet. 488, 9 L. ed. 1167; *Central National Bank v. Stevens*, 171 U. S. 108, 43 L. ed. 7.

(e) the mandate contained mere clerical errors or omissions. *Bank of Ky. v. Wistar,* 3 Pet. 431, 7 L. ed. 731; *Schell v. Dodge,* 107 U. S. 629, 27 L. ed. 601; *Killian v. Ebbinghaus,* 111 U. S. 798, 28 L. ed. 593.

(f) an appeal was erroneously dismissed prior to the time that it was actually docketed. *U. S. v. Gomez,* 23 How. 326, 16 L. ed. 552.

(g) the mandate erroneously remanded the case to the District Court instead of the Court of Appeals. *Palermo v. Luckenbach Steamship Co., Inc.,* 355 U. S. 910, 2 L. ed. 2d 3; *Cahill v. New York, N. H. & H. R. Co.,* 351 U. S. 183, 100 L. ed. 1075; *Boudoin v. Lykes Brothers Steamship Co., Inc.,* 350 U. S. 811, 100 L. ed. 727.

The appellants have failed to cite (and we to find) any case in which a motion to recall has been granted to review the action of a lower court taken, or purporting to have been taken pursuant to a mandate of this Court. In fact, the only cases cited by the appellants in support of their novel procedure — *Cahill v. New York, N. H. & H. R. Co., supra* and *Palermo v. Luckenback S. S. Co., supra* — both dealt with cases where this Court erroneously remanded the cause to the District Court instead of the Court of Appeals, as can be seen from the above tabulation.

In short, a motion to recall has never been used to review the actions of a lower court and it must also be kept in mind that any such use, if permitted, would tend to disrupt the orderly procedure painstakingly established by the rules of this Court governing appeals.

III.

The District Court's Decree is in Strict Conformity With This Court's Order.

As has been pointed out, this Court's order vacating the District Court's original decree was based solely upon a determination that the Commission should be allowed to consider the relationship of the three ports in question and to enter such order with respect to all three as it found the interrelationship to require. The present decree of the District Court permits just that. It remands the cause to the Commission for reconsideration of both the New York and Philadelphia tariffs in light of this Court's order.

The appellants overlook the fact that this Court did not *reverse* the District Court; it did not hold the New York tariff to be lawful. On the contrary, this Court's order approved the District Court's original decree to the extent that it found that there was no substantial basis to support the Commission's finding that the New York rate was lawful. The only action of the District Court with which this Court disagreed was its failure to remand the New York tariff so that the Commission would be able to consider the entire relationship of the three ports and pass such *new* orders as it determined to be necessary. There is not the slightest indication in this Court's order that it intended to require the District Court to permit the New York tariff to become effective pending the I. C. C.'s determination.

Accordingly, it can readily be seen that the determination by the District Court in its second decree that the New York tariff should not go into effect was in no way inconsistent with the mandate. If the appellants felt aggrieved by the relief granted, they had the right to appeal.

However, inasmuch as they did not see fit to take a direct appeal from the decree, they should not be allowed to attack it collaterally by way of a strained construction of this Court's mandate and an argument that the District Court's decree is inconsistent with the mandate as so construed.

Realizing full well that the plain meaning of this Court's order directly refutes their "plain meaning" argument, the appellants resort to "necessary implication" as an alternative approach. Their argument on this point runs as follows: (a) this Court's order removed the Commission's order from further consideration of the District Court whose only remaining function was to act as a mere conduit for the transmission of the cause back to the Commission; (b) having been thus deprived of jurisdiction over the I. C. C. order, the District Court was without jurisdiction to enjoin the tariff inasmuch as the power to so enjoin can not be exercised "apart from the jurisdiction to enjoin a Commission order"; (c) this Court would never pass an order which would permit the District Court to exceed its jurisdiction; (d) therefore this Court's order (or, we suppose, its "necessary implication") must be construed so as to prohibit the District Court from staying the effectiveness of the New York tariff.

To this argument there are numerous answers; we will discuss but two*.

First. Although argued as if the appellant's real contention were that the lower court's action was contrary

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* It is pointed out in the brief in opposition filed by the Baltimore & Ohio Railroad (pp. 7-12) that the District Court does in fact have jurisdiction to stay the effectiveness of a tariff pending reconsideration by the Commission after a remand. As previously noted, we adopt the argument of the B. & O.

to this Court's mandate, it is perfectly clear that the essence of the argument is that the District Court lacked jurisdiction to maintain the *status quo* pending reconsideration of the Commission pursuant to the remand. Even if this contention had merit, it obviously can not be made in the present proceeding.

The District Court had jurisdiction of the parties and the general subject matter, i. e. suits to set aside and enjoin orders of the I. C. C. This being the case, even if a particular action which it took was beyond its jurisdiction the decree can not be collaterally attacked; it is binding on all parties until set aside on direct appeal. *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U. S. 371, 84 L. ed. 329; *Stoll v. Gottlieb*, 305 U. S. 165, 83 L. ed. 104. As we have seen, the appellants failed to appeal from the decree within the thirty days allowed by law and are therefore bound by the decree and prevented from attacking it in the collateral manner now attempted.

Second. This Court's order did not relegate the District Court to the status of a mere mail chute. It did not prevent the lower court from taking any further "judicial action". On the contrary, all that it did was (1) vacate the decree so as to allow the Commission to reconsider the New York tariff in light of the relationship between the three ports and (2) remand the case "for appropriate disposition not inconsistent" with the order. Hence even if it be assumed that a federal court has no power to enjoin the effectiveness of a tariff "apart from the jurisdiction to enjoin a Commission order" it is obvious that the Commission's order was still "before the District Court" when it entered its staying order. The appellant's own test of jurisdiction is thus satisfied.

IV.

No Rehearing is Available at This Time or at This Stage of the Proceedings.

Even a cursory reading of the motion to recall will disclose one inescapable fact: the appellants' real complaint is not that the District Court acted contrary to this Court's order, but rather that this Court's order did not embody all the provisions which they would have liked to see incorporated in it. They would not have been content to remand the matter to the District Court for appropriate disposition — as this Court did. They would have entered an order which would have stripped the District Court of all discretion as to the formulation of specific equitable relief and would have prevented the lower court from using its power to maintain the *status quo* pending the further decision of the Commission. However, the mere fact that the appellants suppose "that, in view of the conclusion to which the court came, as expressed in the opinion, it ought to have entered a different decree from that which it saw fit to enter", affords no ground for the issuance of a motion to recall. *Elizabeth v. American Nicholson Pavement Co.*, 131 U. S. cxlviii App., 24 L. ed. 1059.

If the appellants were dissatisfied with the scope of the relief granted by this Court, Supreme Court Rule 58 gave them the right to file a petition for rehearing within 25 days after the entry of the order. No such petition was filed. Instead, the appellants waited until after the 25 days had expired, until after the lower court had acted pursuant to this Court's order, and even until after the time for appeal from the lower court's decree had expired, and only then did they file the present motion. We do not suggest that there are no cases in which a rehearing should be granted after the expiration of the 25 day period. We do, however, most strenously maintain that no such

rehearing should be granted in this case — regardless of the guise in which such a motion is made. For this Court has specifically held that no rehearing can be granted after remand to the lower court *Peck v. Sanderson,* 18 How. 42, 15 L. ed. 262; *Browder v. M'Arthur,* 7 Wheat. 59, 5 L. ed. 397; *Sibbald v. U. S.,* 12 Pet. 488, 9 L. ed. 1167.

CONCLUSION

Unless orderly appellate procedure is to be disregarded, motions which collaterally attack lower court judgments must be denied. Appellants should not be encouraged to speculate on whether they can convince a lower court to enter a decree more favorable than that actually permitted by this Court's mandate and, if they fail, be allowed to obtain what is in essence a rehearing in an effort to broaden the mandate in their favor. In short, we submit that the appellants are time-barred from invoking any procedure for obtaining appellate review and should not be allowed to achieve the same result by way of indirection.

Respectfully submitted,

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May 20, 1958.

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ERIE RAILROAD COMPANY AND THE PORT OF NEW YORK AUTHORITY, *Appellants*,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees*.

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No. 466

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

ANSWER OF THE BALTIMORE AND OHIO RAILROAD COMPANY, WESTERN MARYLAND RAILWAY COMPANY AND CANTON RAILROAD COMPANY, APPELLEES, TO APPELLANTS' MOTION TO RECALL AND CLARIFY THE JUDGMENT.

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INDEX

	PAGE
STATEMENT	2
ARGUMENT	4
Reply to Point One:	
Contrary to Movants' Argument, The Issuance Of An Interlocutory Injunction By The District Court Is Consistent With The Order And Judgment Of This Court	4
Reply to Point Two:	
Contrary to Movants' Argument, This Court Did Not By "Necessary Implication" Preclude The District Court From Enjoining The New York Rates Pending Remand	7
CONCLUSION	12

TABLE OF CITATIONS

Cases

Board of Railroad Commissioners v. Great Northern Ry., 281 U. S. 412 (1930)	10
Cantlay & Tanzola v. United States, 115 F. Supp. 72 (1953)	10, 11
I.C.C. v. Baltimore & O. R. Co., 355 U.S. 175 (1957)	4, 5
Inland Steel Co. v. United States, et al., 306 U.S. 153 (1939)	10
United States v. U. S. Smelting Co., 339 U.S. 186 (1950)	6
Virginian Ry. v. United States, 272 U.S. 658 (1926)	12

Statutes

28 U.S.C. §2334	11
5 U.S.C. §1009(d)	11

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Come now, The Baltimore and Ohio Railroad Company, Western Maryland Railway Company and Canton Railroad Company, appellees, in answer to appellants' Motion and Brief to Recall and Clarify the Judgment of this Court issued to the United States District Court for the District of Maryland on January 9, 1958.

STATEMENT

These appellees' contend that the question which appellants seek to bring before this Court is not the proper subject for a motion to recall and clarify judgment; that this question could only have been properly raised by a timely appeal from the decree and order of the District Court entered March 18, 1958; and that the time in which such appeal could have been properly taken has expired. In support of this position, these appellees adopt the brief of the Maryland Port Authority, et al., appellees, in opposition to appellants' motion.

Moreover, aside from the point of procedural defect, appellants' motion states no grounds warranting any action by this Court to recall and clarify its judgment.

The Interstate Commerce Commission by its order dated October 1, 1956 found, *inter alia*, that rates on import iron ore from New York made the same as the rates applicable from Baltimore were justified. The appellees here, among other parties, attacked the Commission's order by complaint filed in the District Court for the District of Maryland. That Court, upon a finding that irreparable damage to appellees would result if the equalizing rates from New York were made effective, immediately issued a temporary restraining order staying the Commission's order approving the New York rates and enjoining the appellant railroads from making them effective pending review and decision by the Court. After review the District Court vacated the Commission's order with respect to the New York rates and entered a permanent injunction against making them effective.

The New York railroads, appellants here, thereupon appealed the cause to this Court. In its judgment dated December 9, 1957 this Court did not criticize or reverse the

District Court's determination that the aforementioned order of the Commission lacked substantial basis and thus should be vacated. This Court merely found that the District Court, instead of permanently enjoining the New York rates, should have remanded the issue to the Commission to enable that body to consider port and port rate interrelationships among Baltimore, Philadelphia and New York, and for further order. Pursuant to this mandate the District Court by its decree dated March 18, 1957 remanded the issue of the New York rates to the Commission and enjoined appellant railroads from making such rates effective pending reconsideration and final decision of the Commission pursuant to the remand.

Under these circumstances contrary to appellants' contentions, as appellees will develop fully in their argument, the District Court has the power to enjoin the New York rates pending reconsideration and final order of the Commission, and its action in so doing is:

1. Entirely consistent with the order and judgment of this Court; and
2. Not precluded "by necessary implication" of this Court's order and judgment.

In the same order referred to above the Commission also approved rates on import iron ore from Philadelphia made the same as applicable from Baltimore. This issue likewise was before the District Court on the complaint of these appellees among other parties. The District Court found the order approving the Philadelphia rates not justified by adequate findings and ordered that issue remanded to the Commission for further consideration and order. On appeal this Court upheld the order of the District Court.

The Philadelphia rates have been in effect since February 19, 1954 and a very substantial volume of iron ore has

moved under them through a costly unloading facility constructed at Philadelphia previous to approval of the Philadelphia rates by the Commission. Under these circumstances the District Court permitted the Philadelphia rates to remain in effect "upon the assumption that steps be taken to secure a prompt determination" of the issue by the Commission. There is a material difference between the situation as it pertains to the New York rates and that pertaining to the Philadelphia rates. The New York rates have never been effective and should not now be permitted to become effective, thus encouraging the construction of a costly high-capacity unloading facility at New York, until they are found lawful. To do otherwise would only compound the injury now being inflicted upon appellees by the Philadelphia rates — an injury clearly recognized by the District Court in its admonition for prompt action by the Commission pursuant to remand. The decree of the District Court, far from dealing more harshly with the New York rates than with the Philadelphia rates merely preserves the *status quo* and seeks to prevent a greater degree of injury to appellees than has already occurred. Such action is clearly within the power of the District Court.

ARGUMENT

Reply to Point One

Contrary To Movants' Argument, The Issuance Of An Interlocutory Injunction By The District Court Is Consistent With The Order And Judgment Of This Court.

The argument made by the movants is that when this Court, by its opinion and order of December 9, 1957, 355 U.S. 175, "vacated" "so much of the decree of the District Court as did not affirm the order of the Commission" it necessarily condemned any injunction against the New York rates, and the District Court thereupon became powerless to issue another injunction "pending reconsideration

and final decision by the Commission pursuant to the remand * * *."

The argument is specious. It is grounded upon a misconception of the action taken by this Court in its opinion and order of December 9, 1957.

When the appeals in these cases were presented to this Court last year, the District Court's order included a remand of the Philadelphia rates to the Interstate Commerce Commission and a "permanent" injunction against the New York rates. As a result of the appeals, the *only* change made by this Court was to direct the District Court to convert the "permanent" injunction against the New York rates into a remand to the Commission (along with the Philadelphia rates). The Court said it made this change because:

> "* * * we deem it appropriate that, in reconsidering the relationship between the Philadelphia and Baltimore schedules pursuant to the remand of the District Court, *the Commission should be free to reconsider* and take action upon the New York schedules. In carrying out the District Court's direction regarding the Philadelphia rates, the *Commission should be permitted* to take into account the effect of New York rates on the tariff relationship between Philadelphia and Baltimore and the effect of that relationship on New York and to enter such orders with respect to all three ports as the Commission may find to be required by their interrelationship." (355 U.S. at 178) (Italics supplied.)

It was in the light of this conclusion that the Court ordered to be "vacated" "so much of the decree of the District Court as did not affirm the order of the Commission," and gave the direction that—

> "the cause is remanded for appropriate disposition not inconsistent with this opinion."

Following this mandate, the District Court did in terms "vacate" its order requiring a "permanent" injunction against the New York rates and substituted an order (the one which is the subject of the present motion) which remanded these rates to the Commission and further provided:

> "5. That pending reconsideration and final decision by the Commission pursuant to the remand, the tariff schedules on iron ore from New York filed to become effective February 9, 1953 shall not be made effective or permitted to become effective."

Thus did the District Court change the "permanent" injunction into an interlocutory injunction[1] "pending reconsideration and final decision by the Commission pursuant to the remand." Not only was this action consistent with the opinion of this Court, but any other action would have been inconsistent. The clear purpose of the opinion of this Court was—

> "that, in reconsidering the relationship between the Philadelphia and Baltimore schedules pursuant to the remand of the District Court, the Commission should be *free to reconsider and take action* upon the New York schedules." (Italics supplied.)

This purpose is expressly and clearly served by the District Court's order. The Commission is indisputably "free to reconsider and take action upon the New York schedules" along with the remanded Philadelphia rates. This Court said that the objective of the remand was to find a proper and lawful "interrelationship" with respect "to all three ports". Under the terms of the District Court's order of remand, nothing stands in the way of the accomplishment of this objective.

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[1] See *United States v. U. S. Smelting Co.*, 339 U.S. 186 (1950), at 199.

Reply to Point Two

Contrary To Movants' Argument, This Court Did Not By "Necessary Implication" Preclude The District Court From Enjoining The New York Rates Pending Remand.

Here the argument seems to be that, while the District Court had power originally to enjoin the New York rates "as ancillary relief", it lost that power when:

> "The order of this Court terminated this litigation and withdrew the Commission order, which was the basis for the District Court's jurisdiction, from the further consideration of that Court."

And, say the movants, since:

> "there is no longer any 'order' before the District Court to which an injunction of the involved rates can be ancillary. * * * It is evident * * * that such an injunction was an assumption by the District Court of the bare power to suspend rates while they are before the Commission for its administrative determination of their reasonableness."

Again the argument is specious. It completely ignores the general equity power of the District Court to maintain the status quo pending further litigation.

The precise nature of the rates the movants are so anxious to make effective should be understood at the outset. They are *unlawful* rates — *unlawful* in the sense that the movants have not met their statutory burden of proving them lawful. Not only is this the unqualified finding of the District Court, but it is a finding which the Supreme Court, although asked to do so, did not change. On the contrary, the District Court was upheld on the merits, the only change being that the Supreme Court would give the movants another chance to prove their case before the Commission in the present proceeding.

Moreover, the movants have insisted since the start of this litigation that at New York there are no adequate facilities to transfer iron ore from ship to rail, and consequently, until they were built, Baltimore could not be hurt. From the unreported decision of the District Court granting a temporary restraining order pending hearing before the three-judge Court, the "flat statement by counsel for the New York Central and Erie" was "that these facilities were so inadequate that they would not result in the diversion of any iron ore from Baltimore."[2] The movants regard the building of "the necessary unloading facility * * * at New York" as having the same importance as "equalized rates" in attracting iron ore away from other ports such as Baltimore.[3]

Why, then, are the movants so anxious to dissolve the injunction and "share", as they insist in their present motion, "in the tremendous volume of import iron ore which their Philadelphia and Baltimore competitors have been monopolizing for the past 4 years?"[4]

The clear answer is indicated in the same unreported decision referred to above wherein, to avoid irreparable injury to Baltimore, the District Court granted a temporary restraining order pending consideration by the three-judge court.[5] The Court said:

> "The Court is impressed by the fact that, despite the claim that no diversion from Baltimore to New York could presently take place, the New York Central and Erie Railroads appear to be insistent upon making, or

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[2] *The Baltimore and Ohio Railroad Company, et al. v. United States of America, et al.*, Civil Action No. 9237, filed October 29, 1956, U.S.D.C. for Md.

[3] Brief in opposition to Motion to Affirm as filed in these cases by Erie Railroad, et al., at p. 12.

[4] At p. 4.

[5] See footnote 2, at pp. 7-8.

endeavoring to make, the new rates immediately effective and have declined voluntarily to withhold the institution of such new rates pending the decision herein by the three-judge court, although they have been advised that such court could convene in the very near future, and probably by the early part of December.

"During the course of the hearing it was developed that the Port of Philadelphia, prior to its new installation of ore-unloading facilities, had had no adequate facilities for the unloading of iron ore from ships, but that with the differential between Philadelphia and Baltimore in effect, $10,000,000 had been expended for modern iron ore unloading facilities, after which application had been made to the Interstate Commerce Commission for the elimination of the differential. According to the statements made during the hearings and uncontradicted, one of the arguments advanced before the Commission for the elimination of the differential was that if this were not done, these new facilities would be completely non-income producing. While there is no indication that any immediate modernization of ore unloading facilities will be made in New York, the Court cannot ignore the possibility that a rapid start might be made and a similar argument then made in support of the Commission's decision and order."

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"* * * the Court has no difficulty in finding that the risk of harm to the Baltimore interests from a failure to suspend the effectiveness of the Commission's order (such harm being both financial, i.e., inability to use unloading and loading facilities and interchange equipment in place and available, and from a precedent standpoint) is materially greater if the effectiveness of the Commission's order is not stayed than would be the harm to New York interests if it were stayed, pending determination on the merits by the statutory three-judge court."

Exactly the same considerations require injunctive relief "pending reconsideration and final decision by the Commission pursuant to the remand".

The power of the District Court to provide such relief is not open to question. It "is a power inherent in the Court, as a court of equity, and has been exercised from time immemorial." *Inland Steel Co. v. United States, et al.*, 306 U.S. 153 (1939) at p. 156.

In *Cantlay & Tanzola v. United States*, 115 F. Supp. 72 (1953), there was presented "the question * * * whether injunctive relief is required to preserve the status quo pending further proceedings before the Commission", and the argument was that to grant such relief would represent the suspension of carrier-made rates, a power "intrusted to the Commission only", citing *Board of Railroad Commissioners v. Great Northern Ry.*, 281 U.S. 412 (1930) at p. 429. In its decision the District Court, while recognizing "The Congressional intent * * * that the Courts not interfere to suspend carrier-made rates 'prior to an appropriate finding by the Interstate Commerce Commission", went on to point out (115 F. Supp. at 83):

> "Nowhere does there appear any manifestation of Congressional intent to deprive the district courts of their inherent equity jurisdiction to employ the writ of injunction in maintaining the *status quo* pending hearing and determination of an action, see United States v. United Mine Workers, supra, 330 U.S. at pages 290-295, 67 S. Ct. 677, 91 L. Ed. 884, or 'in affording relief which it was the purpose of Congress to ensure', whenever such a course is necessary to the effectiveness of the court's decree. The Chicago Junction Case, supra, 264 U.S. at page 270, 44 S. Ct. at page 321, 68 L. Ed. 667."

In the cited case an injunction was not found necessary to preserve the status quo since the Court had previously ordered the restoration of the former rates and found that (115 F. Supp. at p. 84):

> "* * * it will not be possible in our opinion for the rail carriers again to lower the rates, without first filing schedules * * *. The Commission may thereupon proceed with a new investigation and suspension proceeding. * * * Finally, any order which might hereafter be made by the Commission, in either a new proceeding or the proceeding hereunder review, would be 'subject to challenge if not adequately supported * * *' and would moreover be subject to stay pending suit in the district court."

In the present case the equalized rates are already on file with the Commission and in the absence of an injunction pending the Commission's reconsideration, they would automatically go into effect — despite the fact that they are *illegal* rates, illegal in the sense that the Commission's order which sanctioned them has been upset in court. In these circumstances, injunctive relief pending remand is required to give Baltimore the same character of protection from irreparable injury as assured the protesting parties in *Cantlay & Tanzola v. United States, supra.*

In granting the present injunction pending remand the District Court acted within its statutory authority.[6] But

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[6] 28 U.S.C. sec. 2324 provides as follows: The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

5 U.S.C. sec. 1009(d) provides as follows: Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent

even if this statutory power is not expressly spelled out (to cover specifically an injunction pending remand) the District Court, acting as a court of equity, had an unquestioned right to forestall during remand the irreparable injury which otherwise would be inflicted upon Baltimore. In so acting the District Court is not circumscribed by the absence of statutory authority. *Virginian Ry. v. United States*, 272 U.S. 658 (1926) at p. 671.

The finding of irreparable injury has *already* been made in this case. See unreported decision cited in footnote 2. The present injunction of the District Court is necessary to guard against the same irreparable injury "pending reconsideration and final decision by the Commission pursuant to the remand". Such protection, so limited, is altogether consistent with the mandate of this Court.

CONCLUSION

In the absence of an injunction pending remand, the movants would be able to make effective rates on import iron ore which they have not justified and which have been found to be unlawful. Under the mandate of the Supreme Court, the movants will have another chance to prove their case, but until and unless they do so, Baltimore is clearly entitled to be protected from irreparable injury.

The threatened publication of these rates was found to inflict irreparable injury before the District Court had had an opportunity to pass on their merits. Now that their unlawful character has been judicially determined, the irre-

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irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

parable nature of the threatened injury is increased. Certainly the District Court, acting as a court of equity, is empowered to issue injunctive relief — limited, as required under the Supreme Court's mandate, to the period "pending reconsideration and final decision by the Commission pursuant to the remand".

Respectfully submitted,

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